Supreme Court, U.S.
FILED
SEP 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-507

No.

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

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**COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, A PUBLIC AGENCY,**

*Petitioner,*

*vs.*

**LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, ET AL.,**

*Respondents.*

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# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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## QUESTION PRESENTED

Whether the California Supreme Court's decision in *County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees' Association, Local 660*, granting Sanitation District workers the right to strike is repugnant and in conflict with the Federal Water Pollution Control Act[1] and the Federal Resource Conservation and Recovery Act of 1976[2].

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[1] 33 U.S.C. §§ 1251-1376 (West Supp. 1977).

[2] 42 U.S.C. §§ 6901-6987 (West Supp. 1977).

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No.

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**COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, A PUBLIC AGENCY,**

*Petitioner,*

*vs.*

**LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, ET AL.,****

*Respondents.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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The Petitioner, County Sanitation District No. 2 of Los Angeles County, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California entered in this proceeding

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** The other Respondents are Victor N. Hochee, Harry Gluck, and Jack Roberts.

on May 13, 1985. On June 27, 1985, the Supreme Court of the State of California denied the timely Petition For Rehearing filed by the Petitioner in this case.

## OPINION AND JUDGMENT BELOW

The opinion of the California Supreme Court (which includes the judgment sought to be reviewed by this Petition), together with the concurring and dissenting opinions, are reprinted as Appendix A. That decision is reported as *County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees' Association, Local 660*, 38 Cal.3d 564, 214 Cal.Rptr. 424, 699 P.2d 835 (1985). The California Court of Appeal decision is reprinted as Appendix B. That decision is reported as *County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees' Association, Local 660*, 147 Cal.App.3d 990, 195 Cal.Rptr 567 (1983) (withdrawn from publication). The California Court of Appeal's decision affirmed the trial court's finding as to liability and modified the damage award. The unreported judgment and findings of fact and conclusions of law of the trial court after trial are reprinted as Appendix C.

## JURISDICTION

The opinion of the California Supreme Court in *Sanitation District* was filed on May 13, 1985. A timely Petition for Rehearing was denied on June 27, 1985. This Court's jurisdiction is properly invoked under 28 U.S.C. § 1257(3).

## STATUTORY PROVISIONS INVOLVED

The Federal Water Pollution Control Act, as amended, and the Federal Resource Conservation and Recovery Act, as amended, are reprinted in pertinent part as Appendices D and E.

## STATEMENT OF THE CASE

Petitioner is one of twenty-seven sanitation districts within Los Angeles County. Each such district is a separate and autonomous political subdivision of the State of California, authorized by the California Health and Safety Code. *Cal. Health and Safety Code* §§ 4700 *et seq.* (West 1970 and Supp. 1983). County Sanitation District No. 2 of Los Angeles County is authorized by a joint powers agreement to act on behalf of itself and the twenty-six other districts in numerous matters, including personnel and labor relations. (These twenty-seven sanitation districts are hereinafter jointly referred to as "the District").

The District operates sewage treatment plants and approximately eleven thousand miles of sewer trunk lines. In 1976, the eleven sewage treatment plants processed approximately four hundred fifty million gallons of raw sewage each day. Most of these plants are upstream "feeders" to the Joint Water Pollution Control Plant located in Carson, California (hereinafter referred to as "JWPCP"). The District also operates sanitary landfills for the disposal of rubbish which in 1976 received approximately fifteen thousand tons of refuse each day. In maintaining these operations, the District served approximately four million County residents.

The District's labor relations are governed by the Meyers-Milias-Brown Act,[3] and its employee relations resolution, as authorized under the Act. Respondent Local 660 is a labor organization affiliated with the Service Employees International Union, AFL-CIO, which has represented the District's blue collar employees since 1973.

The District and Local 660 have bargained concerning the wages, hours and working conditions of the District's blue collar employees, under the Meyers-Milias-Brown Act, since 1973. Each year these negotiations resulted in a binding labor contract or Memorandum of Understanding ("MOU").[4] *See Glendale City Employees Ass'n v. City of Glendale*, 15 Cal.3d 328, 124 Cal.Rptr. 513, 540 P.2d 609 (1975), *cert. denied*, 424 U.S. 943 (1976).

Local 660 has struck in support of its collective bargaining demands on two occasions. In June 1974, Local 660 engaged in a five-day strike supported by virtually all of the District's blue collar employees. Local 660's second strike, the subject of this case, lasted from July 5 through July 16, 1976.

The primary objective of both strikes was to shut down the District's facilities and to force the District to pump raw sewage into waterways and the Pacific Ocean. The purpose of this action was to place economic and political pressure on the District to settle the strikes and to accede to the Union's demands. The Union attempted to accomplish this purpose by withholding the services of its members. There was also a concerted and sophisticated attempt to sabotage critical equipment at the District's facilities, including vital

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[3] *Cal. Gov't Code* §§ 3500-3511 (West 1980 and Supp. 1983).

[4] Prior to 1977, the MOUs were one year in duration.

equipment at the JWPCP.[5] As explained below, the consequences of these actions, if successful, would have been the discharge of raw sewage into waterways and the ocean in direct violation of federal law.

On July 6, 1976, the District filed a complaint for injunctive relief and damages based upon the involvement of Local 660 and the other Respondents in the strike against the District. On the same date the complaint was filed, the District sought and obtained a temporary restraining order prohibiting the strike. However, Local 660 ignored the order. As a result of this failure to obey the order, Local 660 was adjudged guilty of contempt in October 1976, and fined $1,500.

Thereafter, the District proceeded with the prosecution of this action. On August 13, 1981, following a twelve-day bench trial before the Honorable Charles H. Older, judgment was entered in favor of the District in the amount of $246,904, with interest thereon from July 18, 1976, and costs in the amount of $874.65.

The Respondents appealed from this judgment. The Court of Appeal, Second Appellate District[6] affirmed the trial court's finding of liability, declaring itself "bound by the presently well-settled rules that deny public employees the right to strike and which subject those who do engage in

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[5] The acts of sabotage discovered during the strike included: (1) the bacteria in sewage digestion tanks that are used to produce methane gas, the primary source of power for the JWPCP's effluent pumps, were overfed to cause a decrease in methane gas production, (2) a sewage discharge line was blocked with a plywood disc, (3) the battery cables to generators had been cut, and (4) debris was thrown into the sewage system in an attempt to damage the mechanical rakes and screens which prevent flotsam from entering the JWPCP.

[6] The Court of Appeal's decision is reprinted as Appendix B.

such unlawful labor practices to tort actions for damages." *County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees Ass'n Local 660*, 147 Cal.App.3d 990, 997, 195 Cal.Rptr. 567, 540 (1983). The Court of Appeal also affirmed the trial court's award of damages in all respects, with the exception of certain overtime expenses.

The Respondents sought review of the Court of Appeal's decision by filing a Petition for Hearing in November, 1983. In January, 1984, the California Supreme Court granted the hearing, and on May 13, 1985 the Court issued its decision.[7] The California Supreme Court reversed the Court of Appeal and held, in a plurality opinion, that public sector employees have the right to strike unless the strike creates a "substantial and imminent threat" to the health or safety of the public. On May 24, 1985, the District filed a Petition for Rehearing before the California Supreme Court. On June 27, 1985, the Court denied the District's Petition.[8]

## REASON FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

### I

### THE NOVEL AND UNPRECEDENTED DECISION OF THE CALIFORNIA SUPREME COURT PRESENTS AN EXTREMELY IMPORTANT FEDERAL QUESTION WHICH MUST BE RESOLVED BY THIS COURT

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[7] The California Supreme Court's decision is reprinted as Appendix A.

[8] The California Supreme Court's denial of the District's Petition for Rehearing is reprinted as Appendix G.

## A. THE COURT'S DECISION PRESENTS A SUBSTANTIAL CONFLICT WITH THE FEDERAL WATER POLLUTION CONTROL ACT.

The preeminence of protecting the nation's environment, especially the nation's waterways, is demonstrated by the pervasive nature of the Federal Water Pollution Control Act ("Act") and the regulations promulgated pursuant to the Act. *See United States v. Ashland Oil and Transportation*, 504 F.2d 1317 (6th Cir. 1974). The California Supreme Court's decision granting sanitation workers the right to strike is in direct conflict with the declared goals and policies of the Act,[9] as well as the enforcement scheme embodied in the Act. Under the California Supreme Court's decision, strikes by sanitation workers are not unlawful unless they pose a "substantial and imminent" threat to the health or safety of the public. As a result, a California trial court must proceed on a case-by-case basis to determine the legality of a strike by sanitation workers. If the trial court determines that the strike does not meet the new standard,

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[9] Section 1251 of the Act specifically declares:

> 1) [I]t is the national goal that the *discharge* of pollutants into the navigable waters be *eliminated* by 1985; 2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shell fish, and wild life and provides for recreation in and on the water be achieved by July 1, 1983; 3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited; . . . 5) it is the national policy that area wide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State. . . .

33 U.S.C. § 1251(a) (emphasis added).

it may not enjoin the strike even though, contrary to federal law, the strike may cause the District to discharge pollutants into waterways and the Pacific Ocean.

The goal of the Act is to *eliminate* the *discharge of pollutants* into the nation's waterways and oceans. 33 U.S.C. § 1251(a). To accomplish this goal, the Act prohibits the discharge of pollutants into waterways and establishes *strict liability* and substantial civil and criminal penalties for violations.[10] 33 U.S.C. §§ 1319, 1321. *See also United State v. Texas Pipeline*, 611 F.2d 345 (10th Cir. 1979); *United States v. Amoco Oil*, 580 F.Supp. 1042 (D. Mo. 1984); *United States v. Bradshaw*, 541 F.Supp. 884 (D. Md. 1982). However, a strike by sanitation workers is designed to force the District to cease operations and pump raw sewage into the waterways and Pacific Ocean.[11] Therefore, a strike, which is legalized by the California Supreme Court's decision, may force the District to violate the federal Act, and subject the District to substantial civil and/or criminal penalties. *See United States v. Phelps Dodge Corp.*, 391 F.Supp. 1181 (D. Ariz. 1975) (Administrator *must act* in case of *any* violations, but has alternative methods of acting, i.e., either by criminal or civil proceedings). *See also United States v. Frezzo Brothers*, 602

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[10] The Act directs the Administrator of the Environmental Protection Agency ("EPA"), the agency charged with enforcing the Act, to bring suit in United States District Court for any violations of the Act. *See United States v. Phelps Dodge Corp.*, 391 F.Supp. 1181 (D. Ariz. 1975). *See also United States v. Frezzo Brothers*, 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1979).

[11] As previously discussed, the primary purpose of a strike by sanitation workers, as evidenced by the attempted sabotage during the 1976 strike, would be to close down the District's sewage treatment facilities and cause raw, untreated sewage to flow into the nation's waterways, estuaries, and the Pacific Ocean.

F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1979). Furthermore, because a trial court may find that the discharge of pollutants does not pose a "substantial and imminent" threat to the health or safety of the public and refuse to enjoin the strike, the District may be unable to stop the discharge of pollutants.[12] As a result, the District will be forced to violate the federal Act and be subjected to substantial civil and/or criminal liability by reason of conduct that the California Supreme Court has legalized.

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[12] The horrors which inadequate sewage treatment can inflict upon a community were amply chronicled in *People v. City of Los Angeles*, 83 Cal.App.2d 627, 631-632, 189 P.2d 489 (1948):

> A large portion of the sewage was not screened and some of the screen slots were larger than authorized, and frequently raw sewage was bypassed around the screen and discharged either into the submarine tube or directly on the beach. Garbage, fecal matter, solid matter and oily sludge, recognizable as of sewage origin, was visible on all the beaches of Santa Monica Bay from State Park Beach located at the mouth of Santa Monica Canyon south to Malaga Cove. The quality of water along the beach was not safe and suitable for bathing purposes as a result of such discharge and the bacterial count of *escherichia coli* had exceeded ten per cubic centimeter in an area extending along the beach for a distance of approximately ten miles from Brooks Avenue north of the Venice Pier in Los Angeles to 14th Street, north of the Hermosa Beach Pier in Hermosa Beach. . . . There was an objectionable odor condition in the waters and along the beach used by the public. The operation of the treatment works and the disposal of screenings had been conducted in such a manner that it was a menace to public health and had created an offensive odor nuisance.

*See also State of California v. City and County of San Francisco*, 94 Cal.App.3d 522, 156 Cal.Rptr. 542 (1979) (graphic illustration of the effects of pumping raw sewage into the San Francisco Bay).

In conclusion, the California Supreme Court's decision establishes a new standard that is in direct contravention of the goals, objectives, and standards embodied in federal law.

### B. THE COURT'S DECISION PRESENTS A SUBSTANTIAL CONFLICT AND POTENTIAL UNDERMINING OF THE FEDERAL RESOURCE CONSERVATION AND RECOVERY ACT OF 1976.

The Federal Resource Conservation and Recovery Act of 1976 ("Recovery Act"), and the regulations promulgated pursuant to the Recovery Act establish a comprehensive regulatory scheme for the disposal of solid wastes. One of the declared objectives of the legislation is to "[prohibit] future *open dumping* on the land and [to require] the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health." 42 U.S.C. § 6902 (emphasis added). As explained below, the California Supreme Court's decision is in direct contravention of that objective and other specific provisions of the Act and regulations.

Section 6944 of the Recovery Act charged the Administrator of the EPA, the agency responsible for enforcing the Recovery Act, to develop regulations containing criteria for determining whether disposal facilities should be classified as "sanitary landfills" or "open dumps" for purposes of the Recovery Act.

Pursuant to Section 6944, the Administrator developed comprehensive regulations detailing the recommended procedures for the disposal of "municipal solid waste." *See*

40 C.F.R. §§ 241.100 - 241.212-3.[13] These regulations delineate the "minimum levels of performance required of any solid waste land disposal site operation." 40 C.F.R. § 241.100(b). Part 257 of the regulations establishes criteria for the classification of solid waste disposal facilities and practices. *See, e.g.*, 40 C.F.R. § 257.3-8 regarding limitations on the concentration of explosive gases. If these regulations are not adhered to, the site will not be classified as a "sanitary landfill" for purposes of the Recovery Act. Rather, the site will be considered an "open dump" and in violation of the regulations. 40 C.F.R. §§ 257.1 - 257.4.[14] Furthermore, failure to adhere to the regulations could lead to a violation of Section 6943 of the Recovery Act.[15]

Because the purpose of a strike by sanitation workers would be to curtail operations at the sanitary landfills, such disruption may cause the District to operate the landfills in a manner that fails to comply with the EPA's regulations. This potential noncompliance could cause the landfills to be considered open dumps which would be in direct violation of the purposes and objectives of the Recovery Act. As a result, the California Supreme Court's legalization of strikes by sanitation workers is in direct conflict with this vital federal law.

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[13] These regulations are reprinted as Appendix H.

[14] These regulations are reprinted as Appendix H.

[15] The Recovery Act provides for the establishment of state plans for the disposal of solid wastes. Section 6943 establishes the minimum requirements for these state plans. Section 6943 provides that such state plans must *prohibit* the establishment of new *open dumps* and requires that solid wastes be disposed of in sanitary landfills or in an otherwise environmentally sound manner. 42 U.S.C. § 6943(2).

### C. STATE ACTION MUST GIVE WAY TO FEDERAL LEGISLATION WHERE A VALID ACT OF CONGRESS FAIRLY INTERPRETED IS IN CONFLICT WITH THE LAW OF THE STATE.

This Court has long recognized that state laws that "interfere with, or are contrary to the law of Congress" must yield to the federal legislation. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Indeed, the state and federal laws need not be contradictory on their face for the federal laws to supersede. The state law may be struck down if it is in "actual conflict" with the *objectives* that underlie the federal enactments. *See Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967).

Furthermore, state action has been held preempted as interfering with federal legislation if it encourages conduct whose absence would aid in the effectuation of the federal scheme as interpreted and applied. *See Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973).

It is obvious that the California Supreme Court adopted its new standard without regard to any of the public agencies which are obligated to comply with federal laws that are inconsistent with the state court's standard. When the principles of federal preemption are applied to this case, this Court can only conclude that the California Supreme Court's decision is in conflict with federal law. As previously discussed, the Federal Water Pollution Control Act establishes a pervasive regulatory scheme to prevent the discharge of pollutants into the nation's waterways. To effectuate this purpose, the Administrator has promulgated detailed regulations and has actively prosecuted violators of

the Act. However, the California Supreme Court's decision directly conflicts with the purpose of the federal legislation to eliminate discharges of pollutants into the nation's waterways because it encourages activity, namely strikes by sanitation workers, designed to cause the discharge of pollutants into the state's waterways. The California Supreme Court's decision is also in contravention of the purposes of the federal Recovery Act and could result in solid waste disposal which is contrary to the EPA's regulations. The state court's decision thereby encourages conduct, strikes by sanitation workers, whose absence would aid in the effectuation of the federal pollution laws and regulations.

## II

## THE FEDERAL QUESTION WAS TIMELY RAISED BEFORE THE CALIFORNIA SUPREME COURT.

The federal question in this case was timely raised in the District's Petition for Rehearing.[16] It is well established that the federal question may be raised for the first time in the Petition for Rehearing when the federal question is created by an unexpected decision of the state court, giving the litigant no prior opportunity to anticipate or assert the particular federal question. *See Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930). *See also Missouri v. Gehner*, 281 U.S. 313 (1929).

In this case, the California Supreme Court reversed the state's common law and, in an unprecedented decision,

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[16] The Petition for Rehearing is reprinted as Appendix F.

afforded public employees the right to strike. The California Supreme Court also articulated a standard to be used to determine the legality of public employee strikes. The District had absolutely no forewarning that the Supreme Court would reverse the common law and articulate a new standard for determining the legality of public sector strikes. The state court's decision was unprecedented in that no other states had expressly given public sector employees the right to strike by judicial decree.

As a result, the federal question was timely raised in the state court below and this Court has jurisdiction to review that decision. The District could not have anticipated in 1976, that the state Supreme Court would reverse the law and articulate a new standard approximately nine years later. Indeed, the District should not have been expected to anticipate the federal question and raise it at that time. A contrary conclusion would result in a cluttering of federal issues at the trial level that "may" be decided in the future and that "may" give rise to a federal question. *See Herndon v. Georgia*, 295 U.S. 441 (1935) (Cardozo dissent).

Finally, the California Supreme Court's failure to address the federal question in its denial of the Petition for Rehearing does not prevent this Court from granting certiorari. It is well-established that a state court's refusal or failure to articulate its denial of the federal claims is just as reviewable as an express decision on point. *See Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973); *Street v. New York*, 394 U.S. 576, 581-85 (1969); *New York ex. rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

## III.

## CONCLUSION

For the reasons stated herein, Petitioner respectfully requests this Court to grant its Petition For a Writ of Certiorari to the Supreme Court of the State of California.

Respectfully submitted,

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# APPENDIX A

[L.A. No. 31850, May 13, 1985.]

**COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, Plaintiff and Respondent, v. LOS ANGELES COUNTY EMPLOYEES' ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO et al., Defendants and Appellants.**


**Summary**

The trial court, in a tort action, awarded a county sanitation district damages and prejudgment interest against a county employees' union in connection with the union's involvement in a labor strike against the district. The trial court found the strike to be unlawful and violation of the public policy of the state. (Superior Court of Los Angeles County, No. C 166219, Charles H. Older, Judge.)

The Supreme Court reversed, holding the common law prohibition against public sector strikes should not be recognized, that strikes by public sector employees as such are neither illegal nor tortious under California common law, and that it is not unlawful for public employees to engage in a concerted work stoppage for the purpose of improving their wages or conditions of empioyment, unless it has been determined that the work stoppage poses an imminent threat to public health or safety. It held that the right of public employees to strike is not unlimited, and that the Legislature could conclude that certain categories of public employees perform such essential services that a strike would invariably result in imminent danger to the public health and safety, and must therefore be prohibited. It held the courts must proceed on a case-by-case basis.

(Opinion by Broussard, J., with Mosk and Grodin, JJ., concurring. Separate concurring opinion by Kaus, J., with Reynoso, J., concurring. Separate concurring opinion by Bird, C.J. Separate concurring opinion by Grodin, J. Separate dissenting opinion by Lucas, J.)

## HEADNOTES

Classified to California Digest of Official Report, 3d Series

**(1a, 1b) Labor § 47—Labor Disputes—Strikes Against Public Entity—Fire Fighters**—With the exception of fire fighters (Lab. Code, § 1962), no statutory prohibition against strikes by public employees exists in the state.

**(2a, 2b) Labor § 47—Labor Disputes—Strikes Against Public Entity**—The fact that Gov. Code, § 3509, specifically precluding the application to public employees of Lab. Code, § 923, construed to protect the right of private sector employees to strike, is not to be viewed as a general prohibition on the right of public employees to strike.

**(3a-3c) Labor § 47—Labor Disputes—Strikes Against Public Entity — Common Law Prohibition — Rationale.**—The common law prohibition against public employee strikes is not supported by the four policy rationales and justifications advanced in its support, namely that a strike by public employees is tantamount to a denial of governmental authority or sovereignty; the terms of public employment are not subject to bilateral collective bargaining, as in the private sector, since they are set by the legislative body through unilateral lawmaking; that granting public employees the right to strike would afford them excessive bargaining leverage, since legislative bodies are responsible for public employment decisionmaking, and

would result in distortion of the political process and an improper delegation of legislative authority; and that public employees provide the central public services which, if interrupted by strikes, would threaten the public welfare.

**(4a, 4b) Courts § 32—Decisions and Orders—Power and Duty of Courts—Rejection of Common Law Doctrine—Public Employee Strikes.**—The judiciary, and not only the Legislature, can reject the common law doctrine prohibiting public employee strikes. Legislative silence is not the equivalent of positive legislation and does not preclude judicial reevaluation of common law doctrine. Courts may modify, or even abolish the common law rule when reason or equity demand it, or when its underlying principles are no longer justifiable in light of modern society.

**(5a, 5b) Courts § 32—Decisions and Orders—Power and Duty of Courts—Legislative Inaction.**—When the law governing a subject has been shaped and guided by judicial decision, legislative inaction does not necessarily constitute a tacit endorsement of the precise stage in the evolution of the law extant at the time the Legislature did nothing; it may signify that the Legislature is willing to entrust the further evolution of legal doctrine to judicial development.

**(6a-6c) Labor § 47—Labor Disputes—Strikes Against Public Entity—Common Law Prohibition.**—There is no common law prohibition against public sector strikes, such strikes are not tortious under California common law, and it is not unlawful for public employees to engage in a concerted work stoppage for the purpose of improving their wages or conditions of employment, unless it has been determined that the work stoppage poses an imminent threat to public health or safety. Accordingly, a county sanitation district was not entitled to damages and

prejudgment interest awarded against a public employees union predicated on the premise its strike against the district was illegal under the common law prohibition.

[Labor law: Right of public employees to strike or engage in work stoppage, note, 37 **A.L.R.3d** 1147; see also **Cal.Jur.3d,** Labor, § 191; **Am.Jur.2d,** Labor and Labor Relations, § 1734.]

**(7a, 7b) Labor § 13—Labor Unions—Fundamental Right of Workers.**—The right to form and be represented by unions is a fundamental right of American workers that has been extended to public employees through constitutional adjudication as well as by statute.

**(8a, 8b) Labor § 14—Labor Unions—Nature and Purpose—Economic Pressure.**—Workmen may lawfully combine to exert various forms of economic pressure on an employer, provided the object sought to be accomplished thereby has a reasonable relation to the betterment of labor conditions, and they act peaceably and honestly. This right is guaranteed by the federal Constitution as an incident of freedom of speech, press and assemblage, and it is not dependent on the existence of a labor controversy between the employer and his employee.

**(9a, 9b) Constitutional Law § 61—First Amendment and Other Fundamental Rights of Citizens—Governmental Regulation and Restriction of Fundamental Rights — Necessity for Specificity—Freedom of Association.**—Even where a compelling state purpose is present, restrictions on the freedom of association protected by U.S. Const., 1st Amend., and made applicable to the states by U.S. Const., 14th Amend., must be drawn with narrow specificity. First Amendment freedoms are delicate and vulnerable and must be protected wherever possible. When government seeks to limit those freedoms on the basis of legitimate and

substantial governmental purposes those purposes cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. Precision of regulation is required so that the exercise of precious freedoms will not be unduly curtailed except to the extent necessitated by the legitimate governmental objective.

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## OPINION

**BROUSSARD, J.**—Defendants appeal from a judgment awarding plaintiff sanitation district damages and prejudgment interest in connection with defendant union's involvement in a labor strike against plaintiff. The case squarely presents issues of great import to public sector labor-management relations, namely whether all strikes by public employees are illegal and, if so, whether the striking union is liable in tort for compensatory damages. After careful review of a long line of case law and policy arguments, we conclude that the common law prohibition against all public employee strikes is no longer supportable. Therefore, the judgment for the plaintiff finding the strike to be unlawful and awarding damages, interest and costs must be reversed.

### I. Statement of the Case.

Defendant union (Local 660 or the union) is a labor organization affiliated with the Service Employees International Union, AFL-CIO, and has been the certified bargaining representative of the blue collar employees of the Los Angeles Sanitation District since 1973. Plaintiff is one of 27 sanitation districts within Los Angeles County[1] and is charged with providing, operating and maintaining

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[1] Each such district is a separate and autonomous political subdivision of the State of California, authorized by Health and Safety Code section 4700 et seq. County Sanitation District No. 2 of Los Angeles County is authorized by a joint powers agreement to act on behalf of itself and the 26 other districts in numerous matters, including personnel and labor relations. (These 27 sanitation districts are hereinafter jointly referred to as the District.)

sewage transport and treatment facilities and landfill disposal sites throughout the county.[2] The District employs some 500 workers who are directly or indirectly responsible for the operation and maintenance of its facilities and who are members of, or represented by, Local 660. Since 1973, the District and Local 660 have bargained concerning wages, hours and working conditions pursuant to the Meyers-Milias-Brown Act (MMBA). (Gov. Code §§ 3500-3511.) Each year these negotiations have resulted in a binding labor contract or memorandum of understanding (MOU). (See *Glendale City Employees' Assn. v. City of Glendale* (1975) 15 Cal.3d 328 [124 Cal.Rptr. 513, 540 P.2d 609].)

On July 5, 1976, approximatley 75 percent of the District's employees went out on strike after negotiations between the District and the union for a new wage and benefit agreement reached an impasse and failed to produce a new MOU. The District promptly filed a complaint for injunctive relief and damages and was granted a temporary restraining order. The strike continued for approximately 11 days, during which time the District was able to maintain its facilities and operations through the efforts of management personnel and certain union members who chose not to strike.[3] On July 16, the employees voted to

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[2] In 1976, the facilities operated by the District included 6 sanitary landfills which together received about 15,000 tons of solid waste each day, 11 treatment plants processing 450 million gallons of raw sewage per day, 4 maintenance yards, and 46 pumping stations. In maintaining these operations, the District served approximately 4 million residents of the county.

[3] The union maintains that the strike settled on July 12, while the trial court's findings agreed with the District's contention that the strike settled on July 16. In addition, the District maintained that the strike

accept a tentative agreement on a new MOU, the terms of which were identical to the District's offer prior to the strike.

The District then proceeded with the instant action for tort damages. The trial court found the strike to be unlawful and in violation of the public policy of the State of California and thus awarded the District $246,904 in compensatory damages,[4] prejudgment interest in the amount of $87,615.22 and costs of $874.65.

## II. The Traditional Prohibition Against Public Employee Strikes.

Common law decisions in other jurisdictions at one time held that no employee, whether public or private, had a right to strike in concert with fellow workers. In fact, such collective action was generally viewed as a conspiracy and held subject to both civil and criminal sanctions.[5] Over the course of the 20th century, however, courts and legislatures gradually acted to change these laws as they applied to private sector employees; today, the right to strike is

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was not entirely peaceful and had alleged various acts of vandalism were committed by the strikers. The union denied these charges in full.

[4] This figure represents the following strike-related damages: Wages and FICA payments: $304,227; earned compensatory time off valued at $16,040; miscellaneous security, equipment and meal expenses: $55,080; health care benefits paid to striking employees: $6,000; less a $134,443 set off in wages, FICA and retirement benefits that the District did not have to pay out on behalf of striking workers.

[5] See *Commonwealth v. Pullis* (Mayor's Ct. Phil. 91806) reported in 3 Commons, Documentary History of American Industrial Society (1910) p. 59; *Walker v. Cronin* (1871) 107 Mass. 555; *Vegelahn v. Guntner* (1896) 1 67 Mass. 92 [44 N.E. 1077]; *Loewe v. Lawlor* (1908) 208 U.S. 274 [52 L.Ed.488, 28 S.Ct. 301].

generally accepted as indispensable to the system of collective bargaining and negotiation, which characterizes labor-management relations in the private sector.[6]

By contrast, American law continues to regard public sector strikes in a substantially different manner. A strike by employees of the United States government may still be treated as a crime,[7] and strikes by state and local employees have been explicitly allowed by courts or statute in only 10 states.[8]

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[6] Congress gradually, through a series of legislative enactments, not only granted private sector employees a right to strike and to engage in other concerted activities, but also deprived employers of their traditional remedies of injunction and damage suits. (See 38 Stat. 730 (1914) [Clayton Antitrust Act], codified as amended at 15 U.S.C. §§ 15, 17, 26 (1970), 29 U.S.C. § 52 (1970); 47 Stat. 70 (1930) [Norris-La Guardia Act], codified at 29 U.S.C. §§ 101-115 (1970); 47 Stat., pt. II 577 (1926) [Railway Labor Act], codified as amended at 45 U.S.C. §§ 151-188 (1970); 49 Stat. 449 (1935) [Wagner Act], codified as amended at 29 U.S.C. §§ 141-197 (1970).

[7] Employees of the federal government are statutorily prohibited from striking under 5 United States Code section 7311 (1976), which prohibits an individual from holding a federal position if he "participates in a strike, or asserts the right to strike against the Government of the United States . . . ." In *United Federation of Postal Clerks v. Blount* (D.D.C. 1971) 325 F.Supp.879, affd., 404 U.S. 802 [30 L.Ed.2d 38, 92 S.Ct. 80] (1971), the court upheld the constitutionality of the strike prohibitions, yet declared unconstitutional the "wording insofar as it inhibits the *assertion* of the right to strike . . . ." (*Id.* at p. 881 [italics in original].) In 1947, Congress originally denied federal employees the right to strike in section 305 of the Labor Management Relations Act (Taft-Hartley Act), chapter 120, 61 Statutes at Large 136 (1947). This act was repealed and ultimately replaced by section 7311.

[8] Those 10 states are Alaska, Hawaii, Idaho, Illinois, Minnesota, Montana, Oregon, Pennsylvania, Vermont, and Wisconsin. (See further discussion below.) Interestingly, the United States is virtually alone among Western industrial nations in upholding a general prohibition of

Contrary to the assertions of the plaintiff as well as various holdings of the Court of Appeal,[9] this court has repeatedly stated that the legality of strikes by public employees in California has remained an open question. In *Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen* (1960) 54 Cal.2d 684, 687-688 [8 Cal.Rptr. 1, 355 P.2d 905], this court stated in dictum that "[i]n the absence of legislative authorization public employees in general do not have the right to strike . . ." but proceeded to hold that a statute affording public transit workers the right " 'to engage in other concerted activities for the purpose of collectively bargaining or other mutual aid or protection' " granted these employees a right to strike. However, in our very next opinion on the issue, *In re Berry* (1968) 68 Cal.2d 137 [65 Cal.Rptr. 273, 436 P.2d 273], we invalidated an injunction against striking public employees as unconstitutionally overbroad, and *expressly* reserved opinion on "the question whether strikes by public employees can be lawfully enjoined." (*Id.*, p. 151.)

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public employee strikes. Most European countries have permitted them, with certain limitations, for quite some time as has Canada. See, e.g., Anderson, *Strikes and Impasse Resolution in Public Employment* (1969) 67 Mich.L.Rev. 943, 961-964.

[9] See, e.g., *Stationary Engineers v. San Juan Water Dist.* (1979) 90 Cal.App.3d 796, 801 [153 Cal.Rptr. 666]; *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977) 72 Cal.App.3d 100 [140 Cal.Rptr. 41]; *Service Employees' International Union, Local No. 22 v. Roseville Community Hosp.* (1972) 24 Cal.App.3d 400, 408 [101 Cal.Rptr. 69]; *Trustees of Cal. State Colleges v. Local 1352, S.F. State etc. Teachers* (1970) 13 Cal.App.3d 863, 867 [92 Cal.Rptr. 134]; *City of San Diego v. American Federation of State etc. Employees* (1970) 8 Cal.App.3d 308, 310 [87 Cal.Rptr. 258]; *Almond v. County of Sacramento* (1969) 276 Cal.App.2d 32, 35 [80 Cal.Rptr. 518].

In our next opportunity to examine public employee strikes, *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898 [120 Cal.Rptr. 707, 534 P.2d 403], which involved a suit challenging the validity of a strike settlement agreement enacted by the city, we held only that such settlement agreements are valid. After noting the Court of Appeal holdings that public employee strikes are illegal and the employees' counterargument that such strikes are impliedly authorized by statute, our unanimous opinion declared that we had no occasion to resolve that controversy in that action. (*Id.*, p. 912.)

In a similar vein, this court has carefully and explicitly reserved judgment on the issue of the legality of public employee strikes on at least three other occasions in recent years.[10] Indeed, our reluctance to address the issue head-on has elicited critical commentary from both dissenting and concurring opinions, which have urged us to resolve the question once and for all.[11] While we had ample reason for deciding the aforementioned cases without determining the broader question of the right of public employees to strike, the instant case presents us with the proper circumstances for direct consideration of this fundamental issue.

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[10] *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1 [154 Cal.Rptr. 893, 593 P.2d 838]; *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946 [192 Cal.Rptr. 123, 663 P.2d 893]; and *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191 [193 Cal.Rptr. 518, 666 P.2d 960].

[11] See, e.g., dissenting opinion of Richardson, J., in *San Diego Teachers Assn. v. Superior Court, supra*, 24 Cal.3d 1 and concurring opinion of Richardson, J., in *El Rancho Unified School Dist. v. National Education Assn., supra*, 33 Cal.3d at page 962; where he stated that "[t]his court should no longer continue its hesitant, tentative ritual dance around the perimeter of this central legal principle. . . ."

Before commencing our discussion, however, we must note, that the Legislature has also chosen to reserve judgment on the general legality of strikes in the public sector. As Justice Grodin observed in his concurring opinion in *El Rancho Unified School Dist. v. National Education Assn., supra,* 33 Cal.3d 946, 964, "the Legislature itself has steadfastly refrained from providing clearcut guidance."

**(1a)** With the exception of firefighters (Lab. Code, § 1962), no statutory prohibition against strikes by public employees in this state exists.[12] The MMBA, the statute under which the present controversy arose, does not directly address the question of strikes.

The MMBA sets forth the rights of municipal and county employees in California.[13] (Gov. Code §§ 3500-3511.) The

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[12] For just one example, the Winton Act (former Ed. Code § 13080 et seq.), which governed the relationship between local school boards and teachers' unions, neither affirmed nor rejected the teachers' right to strike. In 1975 the Legislature repealed the Winton Act and added new provisions to the Government Code to establish an Education Employment Relations Board (see Gov. Code, § 3540 et seq.); the new enactment also does not prohibit strikes by teachers. It also bears mention that the California Assembly Advisory Council on Public Employee Relations in its final report of March 15, 1973, concluded that, "[s]ubject only to [certain specified] restrictions and limitations . . . public employees should have the right to strike" (p. 24) and proposed a statute to carry out these goals (appen. A). However, this proposed statute was never enacted into law, perhaps further reflecting a legislative decision to leave the ultimate determination of this thorny issue to the judiciary.

[13] The MMBA revised its predecessor, the Brown Act, in 1968. The MMBA amendments, however, apply only to local government employees because the MMBA deleted reference to the "State of California" and explicitly defined "public employee" as one employed by any political subdivision of the state. (See Gov. Code, § 3501.)

MMBA protects the right of such employees "to form, join, and participate in the activities of employee organizations . . . for the purpose of representation on all matters of employer-employee relations." It also requires public employers to "meet and confer" in good faith with employee representatives on all issues within the scope of representation. As explained in its preamble, one of the MMBA's main purposes is to improve communications between public employees and their employers by providing a reasonable method for resolving disputes. A further stated purpose is to promote improved personnel relations by "providing a uniform basis for recognizing the right of public employees to join organizations of their own choice.[14]

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Presently, state employees are governed by the State Employer-Employee Relations Act (Gov. Code, §§ 3512-3524).

Additional groups of employees were excepted from coverage under the Brown Act by previous legislation. These employees are consequently not covered by the MMBA. (See Pub. Util. Code, §§ 25051-25052, added by Stats. 1955, ch. 1036, § 2 at pp. 1960-1961 [governing bargaining between employees of the Alameda-Contra Costa Transit District and their employers]; Pub. Util. Code, Appen. 1 § 3.6(b)-(g) [governing bargaining in the Los Angeles Metropolitan Transit Authority]; Ed. Code, §§ 13080-13089 [governing educational employees].)

For a detailed discussion of the scope and purposes of the MMBA, see Grodin, *Public Employees Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719; Note, *Collective Bargaining Under the Meyers-Milias-Brown Act—Should Local Employees Have the Right to Strike* (1984) 35 Hastings L.J. 523.

[14] However, the MMBA contains no clear mechanism for resolving disputes. It merely provides that if the parties fail to reach an agreement, they *may* agree to appoint a mediator or use other impasse resolution procedures agreed upon by the parties. Additionally, the MMBA does not authorize the establishment of an administrative agency to resolve

On its face, the MMBA neither denies nor grants local employees the right to strike. This omission is noteworthy since the Legislature has not hesitated to expressly prohibit strikes for certain classes of public employees. For example, the above-noted prohibition against strikes by firefighters was enacted nine years before the passage of the MMBA and remains in effect today. Moreover, the MMBA includes firefighters within its provisions. Thus, the absence of any such limitation on other public employees covered by the MMBA at the very least implies a lack of legislative intent to use the MMBA to enact a general strike prohibition.[15]

**(2a)** Plaintiffs have suggested that section 3509 of the MMBA must be construed as a general prohibition on the right to strike because it specifically precludes the

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controversies arising under its provisions. In contrast, statutes governing other public employees in California authorize the Public Employee Relations Board (PERB) to resolve disputes and enforce the provisions of the legislation. (See Gov. Code, § 3541.3 (setting the powers and duties of the PERB under the Educational Employment Relations Act (EERA)); and Gov. Code, § 3513, subd. (g) [making the powers and duties of the PERB under the EERA applicable to the State Employees Relations Act].)

[15] Apparently this decision was the result of political compromise and/or a desire that the courts would take the difficult first step of unambiguously indicating whether public employees generally have the right to strike. As one noted commentator explains, "The entire subject of strikes and impasse resolution procedures is avoided, except for the declaration that the parties may elect to engage a mediator. What emerges is a rather general legislative blessing for collective bargaining at the local governmental level without clear delineation of policy or means for its implementation. The courts have, on the whole, done an admirable job of exegesis, but their decisions cannot help but reflect the underlying weakness of the text." (Grodin, *op. cit. supra*, 23 Hastings L.J. at p. 761.)

application of Labor Code section 923[16] to public employees. Labor Code section 923 has been construed by this court to protect the right of private sector employees to strike (see *Petri Cleaners, Inc. v. Automotive Employees, etc. Local No. 88* (1960) 53 Cal.2d 455 [2 Cal.Rptr. 470, 349 P.2d 76]); yet, an examination of other California statutes governing public employees makes it perfectly clear that section 3509 was *not* included in the MMBA as a means for prohibiting strikes.

A provision identical to section 3509 is contained in the statutes governing educational employees and firefighters. However, an explicit strike prohibition is included in the firefighters statute *in addition* to this provision. The fact that the Legislature felt it necessary to include this express strike prohibition clearly indicates that it neither intended nor expected its preclusion of section 923 to serve as a blanket prohibition against strikes. Furthermore, in *San Diego Teachers Assn. v. Superior Court, supra,* 24 Cal.3d at page 13, this court interpreted section 3549 of the EERA, a provision *identical to* section 3509 of the MMBA, as specifically *not* prohibiting strikes. Therefore, plaintiff's assertion that section 3509 must be read as a legislative prohibition of public employee strikes cannot be sustained.[17]

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[16] Section 923 provides in pertinent part: ". . . the individual workman [shall] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference . . . of employers . . . in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

[17] Since the present case involves employees subject to the MMBA, we do not consider whether provisions of statutes governing other

In sum, the MMBA establishes a system of rights and protections for public employees which closely mirrors those enjoyed by workers in the private sector. The Legislature, however, intentionally avoided the inclusion of any provision which could be construed as either a blanket grant or prohibition of a right to strike, thus leaving the issue shrouded in ambiguity. In the absence of clear legislative directive on this crucial matter, it becomes the task of the judiciary to determine whether, under the law, strikes by public employees should be viewed as a prohibited tort.

### III. The Common Law Prohibition Against Public Employee Strikes.

(3a) As noted above, the Court of Appeal and various lower courts in this and other jurisdictions have repeatedly stated that, absent a specific statutory grant, all strikes by public employees are per se illegal. A variety of policy rationales and legal justifications have traditionally been advanced in support of this common law "rule," and numerous articles and scholarly treatises have been devoted to debating their respective merits.[18] The various

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employees could be interpreted to limit the right of such employees to strike.

[18] Among the more notable works to appear recently on the subject of labor relations in the public sector are: Hanslowe & Acierno, *The Law and Theory of Strikes By Government Employees* (1982) 67 Cornell L.Rev. 1055; Comment, *Public Employee Legislation: An Emerging Paradox, Impact, and Opportunity* (1976) 13 San Diego L.Rev. 931; Comment, *California Assembly Advisory Council's Recommendations on Impasse Resolution Procedures and Public Employee Strikes* (1974) 11 San Diego L.Rev. 473; Comment, *The Collective Bargaining Process at the Municipal Level Lingers in Its Chrysalis Stage* (1974)

justifications for the common law prohibition can be summarized into four basic arguments. First—the traditional justification—that a strike by public employees is tantamount to a denial of governmental authority/sovereignty. Second, the terms of public employment are not subject to bilateral collective bargaining, as in the private sector, because they are set by the legislative body through unilateral lawmaking. Third, since legislative bodies are responsible for public employment decision-making, granting public employees the right to strike would afford them excessive bargaining leverage, resulting in a distortion of the political process and an improper delegation of legislative authority. Finally, public employees provide essential public services which, if interrupted by strikes, would threaten the public welfare.

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14 Santa Clara Law. 397; Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719; Shaw & Clark, *The Practical Differences Between Public and Private Sector Collective Bargaining* (1972) 19 UCLA L.Rev. 867; Lev, *Strikes by Government Employees: Problems and Solutions* (1971) 57 A.B.A.J. 771; Witt, *The Public Sector Strike: Dilemma of the Seventies* (1971) 8 Cal. Western L.Rev. 102; Bernstein, *Alternatives to the Strike in Public Labor Relations* (1971) 85 Harv.L.Rev. 459; Burton & Krider, *The Role and Consequences of Strikes by Public Employees* (1970) 79 Yale L.J. 418; Wellington & Winter, *More on Strikes by Public Employees* (1970) 79 Yale L.J. 441; Kheel, *Strikes and Public Employment* (1969) 67 Mich.L.Rev. 931; Anderson, *Strikes and Impasse Resolution in Public Employment* (1969) 67 Mich.L.Rev. 943; Wellington & Winter, *The Limits of Collective Bargaining in Public Employment* (1969) 78 Yale L.J. 1107; Thorne, *The Government Employee and Organized Labor* (1962) 2 Santa Clara Law. 147; Note, *Labor Relations in the Public Service* (1961) 75 Harv.L.Rev. 391; Annot., Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage (1971) 37 A.L.R.3d 1147.

Our determination of the legality of strikes by public employees necessarily involves an analysis of the reasoning and current viability of each of these arguments. The first of these justifications, the sovereignty argument, asserts that government is the embodiment of the people, and hence those entrusted to carry out its function may not impede it.[19] This argument was particularly popular in the first half of the 20th century, when it received support from several American Presidents.[20]

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[19] For example, in *City of Cleveland v. Division 268 of Amal. Ass'n* (1949) 41 Ohio Ops. 236, 239 [90 N.E.2d 711,715], the court stated that "[i]t is clear that in our system of government, the government is a servant of all of the people. And a strike against the public, a strike of public employees, has been denominated . . . as a rebellion against government. The right to strike, if accorded to public employees . . . is one means of destroying government. And if they destroy government, we have anarchy, we have chaos." A California case which relied on this sovereignty argument is *Nutter v. City of Santa Monica* (1946) 74 Cal.App.2d 292 [168 Cal.Rptr. 741].

[20] Commenting on the Boston police strike, Calvin Coolidge asserted that "[t]here is no right to strike against public safety by anybody, anywhere, at any time" (quoted in *Norwalk Teachers Ass'n v. Board of Education (1951) 138 Conn. 269, 273 [83 A.2d 482, 484, 31 A.L.R.2d 1133]). Woodrow Wilson, commenting on the same strike, stated that the strike is " 'an intolerable crime against civilization' " (quoted in id.*, at p. 273 [83 A.2d at p. 484]).

In another famous pronouncement of the sovereignty argument, President Franklin Roosevelt stated: " '[M]ilitant tactics have no place in the functions of any organization of Government employees. . . . [A] strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.' " (*Id.*, at pp. 273-274 [83 A.2d at p. 484] [quoting a letter from President Roosevelt to the president of the National Federation of Federal Employees (Aug. 16, 1937)].)

The sovereignty concept, however, has often been criticized in recent years as a vague and outdated theory based on the assumption that "the King can do no wrong." As Judge Harry T. Edwards has cogently observed, "the application of the strict sovereignty notion—that governmental power can never be opposed by employee organizations—is clearly a vestige from another era, an era of unexpanded government. . . . With the rapid growth of the government, both in sheer size as well as in terms of assuming services not traditionally associated with the 'sovereign,' government employees understandably no longer feel constrained by a notion that 'The King can do no wrong.' The distraught cries by public unions of disparate treatment merely reflect the fact that, for all intents and purposes, public employees occupy essentially the same position vis a vis the employer as their private counterparts." (Edwards, *The Developing Labor Relations Law in the Public Sector* (1972) 10 Duq.L.Rev. 357, 359-360.)[21]

In recent years, courts have rejected the very same concept of sovereignty as a justification for governmental immunity from tort liability. In California, the death knell

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[21] See also *Anderson Fed. of Teach. v. School City of Anderson* (1969) 252 Ind. 588 [251 N.E. 2d 15, 20, 37 A.L.R.3d 1131] (dis. opn. of DeBruler, C.J.). ("[Sovereign immunity] is not a rational argument at all but a technique for avoiding dealing with the merits of the issue [of whether public employees may strike]. . . . The conflict of real social forces cannot be solved by the invocation of magical phrases like 'sovereignty.' ")

Chief Justice DeBruler also notes that where the government has discretion over the terms and conditions of employment, "[a]ny decision within this discretionary area is authorized by the government, and therefore, obviously does not deny the authority of government." (*Id.*, at p. 20.)

came in *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211 [11 Cal.Rptr. 89, 359 P.2d 457], where this court stated that, "[t]he rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia." (55 Cal.2d at p. 216.) As noted by this court in *Muskopf*, perpetuation of the doctrine of sovereign immunity in tort law led to many inequities, and its application effected many incongruous results. Similarly, the use of this archaic concept to justify a per se prohibition against public employee strikes is inconsistent with modern social reality and should be hereafter laid to rest.

The second basic argument underlying the common law prohibition of public employee strikes holds that since the terms of public employment are fixed by the Legislature, public employers are virtually powerless to respond to strike pressure, or alternatively that allowing such strikes would result in "government by contract" instead of "government by law." (See *City of L.A. v. Los Angeles etc. Council* (1949) 94 Cal.App.2d 36, 46 [210 P.2d 305].) This justification may have had some merit before the California Legislature gave extensive bargaining rights to public employees. However, at present, most terms and conditions of public employment are arrived at through collective bargaining under such statutes as the MMBA.

We have already seen that the MMBA establishes a variety of rights and protections for public employees—including the right to join and participate in union activities and to meet and confer with employer representatives for the purpose of resolving disputed labor-management issues. The importance of mandating these rights, particularly the meet and confer requirement, cannot be ignored. The overall framework of the MMBA represents a nearly exact parallel to the private sector

system of collective bargaining—a system which sets forth the guidelines for labor-management relations in the private sphere and which protects the right of private employees to strike. By enacting these significant and parallel protections for public employees through the MMBA, the Legislature effectively removed many of the underpinnings of the common law per se ban against public employee strikes. While the MMBA does not directly address the issue of such strikes, its implications regarding the traditional common law prohibition are significant.

This argument was eloquently explained by Justice Grodin in his concurring opinion in *El Rancho Unified Sch. Dist. v. National Education Assn., supra,* 33 Cal.3d at page 963, where he pointed out that "[t]he premise underlying the court's opinion in *City of L.A.* [94 Cal.App.2d 36]—that it is necessarily contrary to public policy to establish terms and conditions of employment for public employees through the bilateral process of collective bargaining rather than through unilateral lawmaking—has since been rejected by the Legislature. The heart of the statute under consideration in this case [the Educational Employment Relations Act], for example, contemplates that matters relating to wages, hours, and certain other terms and conditions of employment for teachers will be the subject of negotiation and agreement between a public school employer and organizations representing its employees. (Gov. Code, §§ 3543.2, 3543.3, 3543.7.) Thus, the original policy foundation for the 'rule' that public employee strikes are illegal in this state has been substantially undermined, if not obliterated."

The remaining two arguments have not served in this state as grounds for asserting a ban on public employee strikes but have been advanced by commentators and by

courts of other states. With the traditional reasons for prohibiting such strikes debunked, these additional reasons do not convince us of the necessity of a judicial ukase prohibiting all such strikes.

The first of these arguments draws upon the different roles of market forces in the private and public spheres. This rationale suggests that because government services are essential and demand is generally inelastic, public employees would wield excessive bargaining power if allowed to strike. Proponents of this argument assume that economic constraints are not present to any meaningful degree in the public sector. Consequently, in the absence of such constraints, public employers will be forced to make abnormally large concessions to workers, which in turn will distort our political process by forcing either higher taxes or a redistribution of resources between government services.[22]

There are, however, several fundamental problems with this "distortion of the political process" argument. For one, as will be discussed more fully below, a key assumption underlying the argument—that all government services are essential—is factually unsupportable. Modern governments engage in an enormous number and variety of functions, which clearly vary as to their degree of essentiality. As such, the absence of an unavoidable nexus between most

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[22] See e.g., *United Federation of Postal Clerks v. Blount, supra,* 325 F.Supp. 879, 884. ("In the private sphere, the strike is used to equalize bargaining power, but this has universally been held not to be appropriate when its object and purpose can only be to influence the essentially political decisions of Government in the allocation of its resources.")

For an even more extensive elaboration of this "distortion of the political process" argument, see Wellington & Winter, *The Limits of Collective Bargaining in Public Employment, supra,* 78 Yale L.J. 1107.

public services and essentially necessarily undercuts the notion that public officials will be forced to settle strikes quickly and at any cost. The recent case of the air-traffic controllers' strike[23] is yet another example that governments have the ability to hold firm against a strike for a considerable period, even in the face of substantial inconvenience. As this court concluded in *Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen, supra*, "Permitting employees to strike does *not* delegate to them authority to fix their own wages to the exclusion of the employer's discretion. In collective bargaining negotiations, whether or not the employees strike, the employer is free to reject demands if he determines that they are unacceptable." (54 Cal.2d at p. 693, italics added.)

Other factors also serve to temper the potential bargaining power of striking public employees and thus enable public officials to resist excessive demands: First, wages lost due to strikes are as important to public employees as they are to private employees. Second, the public's concern over increasing tax rates will serve to prevent the decisionmaking process from being dominated

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[23] In August 1981, the Professional Air Traffic Controllers Organization (PATCO) launched a nationwide strike against the federal government. President Ronald Reagan ordered the discharge of 11,000 striking controllers who had not returned to work within a two-day grace period. Up to the time of this writing, the Administration has rejected all suggestions for a general amnesty, its position being that the strikers, by violating the federal government's prohibition on strikes and their own "no strike" oath, have forfeited their jobs with the Federal Aviation Administration forever. Federal courts upheld the government's position in *PATCO v. Federal Labor Relations Authority* (D.C. Cir. 1982) 685 F.2d 547. For a more detailed analysis of the strike, see Meltzer & Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers* (1983) 50 U.Chi.L.Rev. 731.

by political instead of economic considerations. A third and related economic constraint arises in such areas as water, sewage and, in some instances, sanitation services, where explicit prices are charged. Even if representatives of groups other than employees and the employer do not formally enter the bargaining process, both union and local government representatives are aware of the economic implications of bargaining which leads to higher prices which are clearly visible to the public. A fourth economic constraint on public employees exists in those services where subcontracting to the private sector is a realistic alternative. For example, Warren, Michigan resolved a bargaining impasse with an American Federation of State, County and Municipal Employees (AFSCME) local by subcontracting its entire sanitation service; Santa Monica, California, ended a strike of city employees by threatening to subcontract its sanitation operations; in fact, San Francisco has chosen to subcontract its entire sanitation system to *private* firms. If this subcontract option is preserved, wages in the public sector clearly need not exceed the rate at which subcontracting becomes a realistic alternative.[24]

The proponents of a flat ban on public employee strikes not only ignore such factors as the availability of subcontracting, but also fail to adequately consider public sentiment towards most strikes and assume that the public will push blindly for an early resolution at any cost. In fact, public sentiment toward a strike often limits the pressure felt by political leaders, thereby reducing the strike's

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[24] See further discussion in Burton & Krider, *The Role and Consequences of Strikes by Public Employees, supra*, 79 Yale L.J. 418, 425-427.

effectiveness. A Pennsylvania Governor's Commission Report stressed just such public sentiment as an important reason to *grant* a limited right to strike: "[T]he limitations on the right to strike which we propose . . . will appeal to the general public as so much fairer than a general ban on strikes that the public will be less likely to tolerate strikes beyond these boundaries. Strikes can only be effective so long as they have public support. *In short, we look upon the limited and carefully defined right to strike as a safety valve that will in fact prevent strikes.*"[25] *(Italics in original.)*

In sum, there is little, if any empirical evidence which demonstrates that governments generally capitulate to unreasonable demands by public employers in order to resolve strikes. The result of the strike in the instant case clearly suggests the opposite. During the 11-day strike, negotiations resumed, and the parties subsequently reached an agreement on a new MOU, the terms of which were *precisely the same* as the District's last offer prior to the commencement of the strike. Such results certainly do not illustrate a situation where public employees wielded excessive bargaining power and thereby caused a distortion of our political process.

The fourth and final justification for the common law prohibition is that interruption of government services is unacceptable because they are essential. As noted above, in our contemporary industrial society the presumption of essentiality of most government services is questionable at

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[25] Governor's Commission to Revise the Public Employee Law of Pennsylvania, Report and Recommendations, reprinted in 251 Govt. Empl. Rel. Rep. (BNA) E-1, E-3 (1968). This report is discussed in detail in Hanslowe & Acierno, *The Law and Theory of Strikes by Government Employees, supra*, 67 Cornell L.Rev. 1055.

best. In addition, we tolerate strikes by private employees in many of the same areas in which government is engaged, such as transportation, health, education, and utilities; in many employment fields, public and private activity largely overlap.

In a dissenting opinion in *Anderson Fed. of Teach. v. School City of Anderson, supra,* Chief Justice DeBruler of Indiana observed that the source and management of most service enterprises is irrelevant to the relative essentiality of the services: "There is no difference in impact on the community between a strike by employees of a public utility and employees of a private utility; nor between employees of a municipal bus company and a privately owned bus company; nor between public school teachers and parochial school teachers. The form of ownership and management of the enterprise does not determine the amount of destruction caused by a strike of the employees of that enterprise. In addition, the form of ownership that is actually employed is often a political and historical accident, subject to future change by political forces. Services that were once rendered by public enterprise may be contracted out to private enterprise, and then by another administration returned to the public sector." (251 N.E.2d at p. 21.)

Recently, the United States Supreme Court also eschewed the classic equation of public ownership of an industry with the essentiality of that industry. In an earlier case which reflected the traditional reasoning, *United States v. Mineworkers* (1947) 330 U.S. 258 [91 L.Ed. 884, 67 S.Ct. 677], the Supreme Court had held that the government's wartime seizure of private coal mines rendered those mining operations public services and changed the rights of the miners, though the function of the

mines remained exactly the same. The court then approved the issuance of an injunction against striking workers, a remedy that would not have been available had the mines still been considered a private enterprise.

In the recent case of *Transportation Union v. Long Island R. Co.* (1982) 455 U.S. 678 [71 L.Ed.2d 547, 102 S.Ct. 1349], however, the court held that employees of a formerly private railroad, which had recently been acquired by a governmental entity, retained their right to strike under the Railway Labor Act. In this latter instance, the Supreme Court clearly recognized that the public takeover of the railroad did not necessarily change the rights of the employees; the court therefore suggested that the railroad became no more essential after its public acquisition. Although the decision's basis in the supremacy clause limits its direct precedential value on labor law, the ruling nevertheless signifies a major departure from the court's earlier holding in *United Mineworkers, supra*—that a service becomes essential once it comes under government control. The *United Transportation Union* case thus underscores the conclusion that it is *the nature of the service provided* which determines its essentiality and the impact of its disruption on the public welfare, as opposed to a simplistic determination of whether the service is provided by public or private employees. Indeed, strikes by private workers often pose a more serious threat to the public interest than would many of those which involve public employees.

We of course recognize that there are certain "essential" public services, the disruption of which would seriously threaten the public health or safety. In fact, defendant union itself concedes that the law should still act to render illegal any strikes in truly essential services which would constitute

a genuine threat to the public welfare. Therefore, to the extent that the "excessive bargaining power" and "interruption of essential services" arguments still have merit, specific health and safety limitations on the right to strike should suffice to answer the concerns underlying those arguments.

In addition to the various legal arguments advanced to persuade the courts to impose a judicial ban on public employee strikes—arguments which, as we have seen, are decidedly unpersuasive in the context of modern jurisprudence and experience—there is the broader concern that permitting public employees to strike may be, on balance, harmful to labor-management relations in the public sector. This is essentially a political argument, best addressed to the Legislature. We review the matter only to point out that the issue is not so clear cut as to justify judicial intervention, since the Legislature could reasonably conclude that recognizing public employees' right to strike may actually enhance labor-management relations.

At least 10 states have granted most of their public employees a right to strike;[26] and the policy rationale behind this statutory recognition further undercuts several of the basic premises relied upon by strike-ban advocates. As the aforementioned Pennsylvania Governor's Commission Report concluded: "The collective bargaining process

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[26] See footnote 8, *ante*, for a list of the 10 states. Typically these statutes permit public sector strikes, unless such strikes endanger the public health, safety, or welfare. The statutes generally prohibit strikes by police and fire-protection employees, employees in correctional facilities, and those in health-care institutions. In some instances, statutes provide binding arbitration to resolve certain disputes for which strikes are proscribed. Thus, the public sector strike has begun to achieve some degree of legitimacy, despite the strong opposition of critics.

will be strengthened if this qualified right to strike is recognized. It will be some curb on the possible intransigence of an employer; and the limitations on the right to strike will serve notice on the employee that there are limits to the hardships that he can impose." (251 Govt. Empl. Rel. Rep., *supra*, at p. E-3.)

It is unrealistic to assume that disputes among public employees and their employers will not occur; in fact, strikes by public employees are relatively frequent events in California. For example, 46 strikes occurred during 1981-1983, which actually marks a significant decline when compared to the number during the 5 previous years.[27] Although the circumstances behind each individual strike may vary somewhat, commentators repeatedly note that much of the reason for their occurrence lies in the fact that without the right to strike, or at least a credible strike threat, public employees have little negotiating strength. This, in turn, produces frustrations which exacerbate labor-management conflicts and often provoke "illegal" strikes.

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[27] Public employee strikes in California, 1970-1983:*

| 1970 | 1971 | 1972 | 1973 | 1974 | 1975 | 1976 |
|---|---|---|---|---|---|---|
| 20 | 14 | 18 | 15 | 45 | 44 | 23 |

| 1977 | 1978 | 1979 | 1980 | 1981 | 1982 | 1983 |
|---|---|---|---|---|---|---|
| 59 | 29 | 87 | 55 | 20 | 6 | 20 |

*Source: *An Analysis of 1981-1983 Strikes in California's Public Sector* (1984) (Mar. 1984 Inst. Of Ind. Rel., U.C. Berkeley) 60 Cal. Pub. Empl. Rel. 7, 9. Public employees include all workers in public agencies in California, excluding federal service and public utilities.

The noted labor mediator, Theodore W. Kheel, aptly described this process when analyzing New York's Taylor Law (which makes all public employee strikes illegal) and its resultant effect on labor relations in that state: "It would be unfair to place upon the legal machinery sole responsibility for these interruptions of critical services on which the welfare of New York depends. But the fact remains that the machinery—including the prohibition on strikes with attendant penalties and the fact-finding boards with their power to make recommendations—did not work to settle these disputes or stop the strikes, slowdowns, or threats. In fact it is probable that the Taylor Law exacerbated these conflicts. For one thing, it made subversive a form of conduct society endorsed for private workers. It encouraged unions to threaten to strike to achieve the bargaining position participants in collective bargaining must possess. It made the march to jail a martyr's procession and a badge of honor for union leaders. . . . . In simple point of fact, it did not and is not likely to work as a mechanism for resolving conflicts in public employment relations through joint determination, whether called collective bargaining or collective negotiations." (Kheel, *Strikes and Public Employment, supra,* 67 Mich.L.Rev. 931, 936.)[28]

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[28] Indeed the per se prohibition is notoriously ineffective. See Comment, *California Assembly Advisory Council's Recommendations on Impasse Resolution Procedures and Public Employee Strikes, supra,* 11 San Diego L.Rev. 473, 480. The council's study found that the "present laws do not deter strikes, and furthermore, that once an illegal strike is instituted the law has very little effect in compelling the strikers to return to work. Part of the reason for this is that many public employers hesitate to request an injunction because they believe that the employees would continue to strike, thereby forcing the employer to either initiate contempt proceedings and subject his employees to quasi-

It is universally recognized that in the private sector, the bilateral determination of wages and working conditions through a collective bargaining process, in which both sides possess relatively equal strength, facilitates understanding and more harmonious relations between employers and their employees. In the absence of some means of equalizing the parties' respective bargaining positions, such as credible strike threat, both sides are less likely to bargain in good faith;[29] this in turn leads to unsatisfactory and acrimonious labor relations and ironically to more and longer strikes. Equally as important, the possibility of a strike often provides the best impetus for parties to reach an agreement at the bargaining table, because *both* parties lose if a strike actually comes to pass. Thus by providing a clear incentive for resolving disputes, a credible strike threat may serve to avert, rather than to encourage, work stoppages.

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criminal penalties, or stand idly and ineffectually by as the illegal strike continues. Either of these alternatives, if pursued, would have a deleterious effect on future employee-management relations once the strike is settled."

See also statement of Professor Reginald Alleyne, UCLA Law School, in the Transcript of Proceedings, MMBA Hearing, California Legislative Assembly, Interim Public Employment and Retirement Committee, page 20. Professor Alleyne cited statistics which supported his view that "In 99 and 9/10 of the cases in the private sector they succeed and reach an agreement."

See also Cebulski, *An Analysis of 22 Illegal Strikes and California Law* (1973) 18 Cal. Pub. Empl. Rel. 2, 9 (chart showing that strikes in which public sector employers imposed legal sanctions lasted *twice as long* as strikes in which the employers did not attempt to impose sanctions).

[29] See, e.g., *Timberlane Reg. Sch. Dist. v. Timberlane Reg. Ed. Ass'n* (1974) 114 N.H. 245 [317 A.2d 555, 557].

Theodore Kheel has explained this argument very well: "[W]e should acknowledge the failure of unilateral determination, and turn instead to true collective bargaining, even though this must include the possibility of a strike. We would then clearly understand that we must seek to improve the bargaining process and the skill of the negotiators to prevent strikes. . . . With skillful and responsible negotiators, no machinery, no outsiders, and no fixed rules are needed to settle disputes. For too long our attention has been directed to the mechanics and penalties rather than to the participants in the process. It is now time to change that, to seek to prevent strikes by encouraging collective bargaining to the fullest extent possible."[30]

A final policy consideration in our analysis addresses a more philosophical issue—the perception that the right to strike, in the public sector as well as in the private sector, represents a basic civil liberty.[31] The widespread acceptance

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[30] Kheel, *op. cit. supra*, 67 Mich.L.Rev. at pages 940-941.

[31] Another interesting and related policy argument in support of granting a right to strike to public employees rests on a recognition of the changing shape and values of the American economic system itself. In essence, it focuses on the fact that our market economy has evolved from its classical model into an increasingly mixed and pluralistic form. In this process of increased government intervention, the line between public and private enterprise has become increasingly blurred. At the same time, a concomitant blurring has occurred between traditional political and economic activity, and it is this latter overlap which renders a flat ban on all public sector strikes so difficult to defend.

The argument then analogizes the deviation of the American system from classical economic models and the corresponding reevaluation of public strike prohibitions to the Solidarity-inspired developments in Poland prior to the latest military crackdown. Ironically, the traditional common law argument that public sector bargaining and striking is anti-democratic and inimical to our political process, closely mirrors the Polish government's view that unions and strikes are antisocial—indeed

of that perception leads logically to the conclusion that the right to strike, as an important symbol of a free society, should not be denied unless such a strike would substantially injure paramount interests of the larger community.

**(4a)** Plaintiff's argument that only the Legislature can reject the common law doctrine prohibiting public employee strikes flies squarely in the face of both logic and past precedent. Legislative silence is not the equivalent of positive legislation and does not preclude judicial reevaluation of common law doctrine. If the courts have created a bad rule or an outmoded one, the courts can change it.

This court has long recognized the need to redefine, modify or even abolish a common law rule "when reason or equity demand it" or when its underlying principles are no longer justifiable in light of modern society. (See *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 394 [115 Cal.Rptr. 765, 525 P.2d 669]; *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, 216 [11 Cal.Rptr. 89, 359 P.2d 457]; *Green v. Superior Court* (1974) 10 Cal.3d 616, 629 [111 Cal.Rptr. 704, 517 P.2d 1168]; *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 808 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393].)

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revisionist and reactionary—conduct in a system operated purportedly for the benefit of all. Deviations from classical models and beliefs thus confront both ideological viewpoints. The argument for a right to strike for public employees in a capitalist system clearly gains strength as society evolves away from the classical ideal of a pure market economy where the public and private sectors are clearly separated. Similarly, the case for a right to strike in a socialist system grows stronger as that society deviates from the classical ideals of the socialist model. For a more detailed analysis of this theory, see Hanslowe & Acierno, *supra*, 67 Cornell L.Rev. at pages 1072-1073.

This court's history provides numerous examples of this principle. In *Li v. Yellow Cab Co., supra,* 13 Cal.3d at page 812, when this court first adopted a rule of comparative negligence, we expressly rejected the contention that any change in the law of contributory negligence was exclusively a matter for the Legislature, and overturned more than a century of precedent. In *Rodriguez v. Bethlehem Steel Corp., supra,* 12 Cal.3d 382, we directly repudiated the assertion that recognition of a spousal action for loss of consortium required legislative action (see pp. 393-395) and reversed numerous prior decisions in endorsing that cause of action.

**(5a)** Furthermore, "[w]hen the law governing a subject has been shaped and guided by judicial decision, legislative inaction does not necessarily constitute a tacit endorsement of the precise stage in the evolution of the law extant at the time when the Legislature did nothing; it may signify that the Legislature is willing to entrust the further evolution of legal doctrine to judicial development." (*People v. Drew* (1978) 22 Cal.3d 333, 347, fn. 11 [149 Cal.Rptr. 275, 583 P.2d 1318].)

**(6a)** For the reasons stated above, we conclude that the common law prohibition against public sector strikes should not be recognized in this state. Consequently, strikes by public sector employees in this state as such are neither illegal nor tortious under California common law. We must immediately caution, however, that the right of public employees to strike is by no means unlimited. Prudence and concern for the general public welfare require certain restrictions.

The Legislature has already prohibited strikes by firefighters under any circumstance. It may conclude that other categories of public employees perform such essential

services that a strike would invariably result in imminent danger to public health and safety, and must therefore be prohibited.[32]

While the Legislature may enact such specific restrictions, the courts must proceed on a case-by-case basis. Certain existing statutory standards may properly guide them in this task. As noted above, a number of states have granted public employees a limited right to strike, and such legislation typically prohibits strikes by a limited number of employees involved in clearly essential services. In addition, several statutes provide for injunctive relief against other types of striking public employees when the state clearly demonstrates that the continuation of such strikes will constitute an imminent threat or "clear and present danger" to public health and safety.[33] Such an approach

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[32] See, e.g., Minnesota Statutes Annoted section 179.63(11) (1981) (firefighters, peace officers, guards at correctional facilities), Oregon Revised Statutes section 243.736 (1979) (firefighters, police officers and guards at correctional or mental health institutions); Pennsylvania Statutes Annotated title 43, section 1101.1001 (guards at correctional or mental health institutions and employees necessary to the functioning of the courts). For a further discussion of these provisions, see Hanslowe & Acierno, *The Law and Theory of Strike by Government Employees, supra*, 67 Cornell L.Rev. 1055, 1079-1083.

See also Burton & Kinder, *supra*, 79 Yale L.J. at page 437 (advocating a presumption of illegality in strikes involving truly essential services, thereby relieving the state of the burden to demonstrate the elements necessary for an injunction).

[33] See, e.g., Alaska Statutes section 23.40.200(c) (strikes by most public employees may not be enjoined unless it can be shown that it has begun to threaten the health, safety and welfare of the public); Oregon Revised Statutes section 243.726(3)(a) (injunctive relief available when strike creates a clear and present danger or threat to the health, safety or welfare of the public); Pennsylvania Statutes Annotated title 43, section 1101.1003 (injunctive relief available when strike creates a clear and

guarantees that essential public services will not be disrupted so as to genuinely threaten public health and safety, while also preserving the basic rights of public employees.

After consideration of the various alternatives before us, we believe the following standard may properly guide courts in the resolution of future disputes in this area: strikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public. This standard allows exceptions in certain essential areas of public employment (e.g., the prohibition against firefighters and law enforcement personnel) and also requires the courts to determine on a case-by-case basis whether the public interest overrides the basic right to strike.

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present danger or threats to the health, safety or welfare of the public); Wisconsin Statutes Annotated section 111.70(7m)(b) (injunctive relief available if strike poses an imminent threat to the public health or safety). See also *School District for City of Holland v. Holland Educ. Ass'n* (1968) 348 Mich. 314 [157 N.W.2d 206, 210] (Mich. Supreme Ct., in teachers strike cases, declaring state's policy is not "to issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace"); *Timberlane Reg. Sch. Dist. v. Timberlane Reg. Ed. Ass'n* (1974) 114 N.H. 245 [317 A.2d 555, 559] (N.H. Supreme Ct. refused to rule on the legality of teachers' strikes but stated that in determining whether to issue a strike injunction, a court should consider "whether the public health, safety and welfare will be substantially harmed if the strike is allowed to continue."). The Federal Labor Management Relations Act of 1947 [29 U.S.C. §§ 141-187], follows a similar approach with respect to private sector strikes. It empowers the President to direct the Attorney General to enjoin a threatened or actual strike if it affects an industry involved in interstate commerce and if permitted to occur or continue would imperil the national health or safety. (29 U.S.C. §§ 176-180.)

Although we recognize that this balancing process may impose an additional burden on the judiciary, it is neither a novel nor unmanageable task.[34] Indeed, an examination of the strike in the instant case affords a good example of how this new standard should be applied. The 11-day strike did not involve public employees, such as firefighters or law enforcement personnel, whose absence from their duties would clearly endanger the public health and safety.

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[34] Legislation in several states already requires the courts to make this precise determination. (See, e.g., the relevant statutory provisions in Alaska, Ore., Pa. and Wis.) For just one example, under the Pennsylvania Public Employee Relations Act, public employees are not prohibited from striking after they have submitted to mediation and fact finding, unless or until such a strike creates a clear and present danger or threat to the health, safety and welfare of the public. (Pa. Stat. Ann., tit. 43, § 1101.1003.) In such cases, the employer may petition for equitable relief, including injunctions, and is entitled to relief if the court finds that the strike creates the danger or threat. (*Id.*) The Pennsylvania courts have applied this standard to several classes of public employees. (See, e.g., *Bethel Park Sch. v. Bethel Park Fed. of Tchrs. 1607 Am. Fed'n of Teachers* (1980) 54 P. Commw. 49, 52 [420 A.2d 18] (teacher's strike constituted a clear and present danger to the public's health, safety and welfare and school district entitled to back-to-work order in view of potential losses of state subsidies, instructional days vocational job, higher education opportunities, counseling, social and health services, extracurricular enrichment programs and employees' work opportunities and wages); *Bristol Township Education Ass'n v. School District* (1974) 14 Pa. Commw. 463, 468-470 [322 A.2d 767] (school district entitled to injunction against teacher's strike under similar circumstances); *Highland Sewer and Water Auth. v. Local Union 459, I.B.E.W.* (1973) 67 Pa. D. & C.2d 564, 565-567 (sewer and water authority not entitled to injunction forcing striking employees back to work since there was no clear and present danger in view of the fact that the services provided by the authority could still be performed during the strike, apparently by supervisors, with relatively little inconvenience).

Moreover, there was no showing by the District that the health and safety of the public was at any time imminently threatened. That is not to say that had the strike continued indefinitely, or had the availability of replacement personnel been insufficient to maintain a reasonable sanitation system, there could not have been at some point a clear showing of a substantial threat to the public health and welfare.[35] However, such was not the case here, and the legality of the strike would have been upheld under our newly adopted standard.[36]

Defendant union has also urged this court to find that a per se prohibition of all public employee strikes violates the California Constitution's guarantees of freedom of associa-

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[35] Had such a showing been made, the trial court would then have had the authority to issue an injunction and declare the strike illegal. In cases involving sanitation strikes, it is often the *length* of the strike which will ultimately require issuance of an injunction. (See, e.g., *Highland Sewer and Water Auth. v. Local Union 459, I.B.E.W., supra,* 67 Pa. D & C.2d 564, 565-567.) In addition, if particular jobs performed by striking sanitation or other public employees require unique skills and training, it is conceivable that a public agency might be unable to find adequate replacements. In the instant matter, however, replacement personnel adequately maintained needed sanitation services without any significant threat of harm to the public. Further, the District's allegations of vandalism by the strikers (see fn. 4, *ante*), while perhaps citing individual illegal acts, were by no means enough to render the entire strike illegal or even a substantial public threat.

[36] The trial court in this matter had no reason to make a finding regarding the threat to public health and safety posed by the strike. The court merely relied on prior Court of Appeal opinions, which had held that public employee strikes were per se illegal in the absence of a specific statutory grant. In the future, trial courts will clearly be required to make such a finding. In these cases, the scope of appellate review will ordinarily be limited to determining whether reasonable grounds existed for the trial court's decision.

tion, free speech, and equal protection. The [illegible] not contend that such a constitutional infringement is present when a court exercises its equitable authority to enjoin a strike based on a showing that the strike represents a substantial and imminent danger to the public health or safety. Instead, the union argues that in the absence of such a showing, per se prohibition is constitutionally unsupportable.

**(7a)** The right to form and be represented by unions is a fundamental right of American workers that has been extended to public employees through constitutional adjudication[37] as well as by statute; in this case, it is

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[37] In upholding the National Labor Relations Act against constitutional attack, the United States Supreme Court recognized that the right of employees to organize for the purpose of collective bargaining is fundamental. (*Labor Board v. Jones & Laughlin* (1937) 301 U.S. 1, 33 [81 L.Ed. 893, 909, 57 S.Ct. 615, 108 A.L.R. 1352].)

It is also axiomatic that employees form and join labor organizations to protect their interests in labor disputes, and the United States Supreme Court has long recognized that "[i]n the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. [Citations.]" (*Thornhill v. Alabama* (1940) 310 U.S. 88, 102 [84 L.Ed. 1093, 1102, 60 S.Ct. 736].) In addition, whenever a labor organization undertakes a concerted activity, its members exercise their right to assemble, and organizational activity has been held to be a lawful exercise of that right. (*Thomas v. Collins* (1945) 323 U.S. 516 [89 L.Ed. 430, 65 S.Ct. 315].)

The freedoms of speech and assembly are applicable to the states through the Fourteenth Amendment (*Hague v. C.I.O.* (1939) 307 U.S. 496 [83 L.Ed. 1493, 59 S.Ct. 954]), and may be exercised in an economic context. As explained by the United States Supreme Court in *N.A.A.C.P. v. Alabama:* "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. [Citations.] It is beyond debate that freedom to engage in association for

specifically mandated by the provisions of the MMBA itself. **(8a)** In addition, " '[i]t is now settled law that workmen may lawfully combine to exert various forms of economic pressure upon an employer, provided the object sought to be accomplished thereby has a reasonable relation to the betterment of labor conditions, and they act peaceably and honestly. (Citations) This right is guaranteed by the federal Constitution as an incident of freedom of speech, press and assemblage, (citations) and it is not dependent upon the existence of a labor controversy between the employer and his employee.' " (*In re Blaney* (1947) 30 Cal.2d 643, 648 [184 P.2d 892], quoting *Steiner v. Long Beach Local No. 128* (1942) 19 Cal.2d 676, 682 [123 P.2d 20].)

As the union contends, however, the right to unionize means little unless it is accorded some degree of protection regarding its principal aim—effective collective bargaining. For such bargaining to be meaningful, employee groups must maintain the ability to apply pressure or at least threaten its application. A creditable right to strike is one means of doing so. As yet, however, the right to strike has not been accorded full constitutional protection, the prevailing view being that "[t]he right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and

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the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. [Citations.] Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." (*N.A.A.C.P. v. Alabama, supra*, 357 U.S. 449, 460 [2 L.Ed.2d 1488, 1498, 78 S.Ct. 1163].)

select representatives for lawful purposes of collective bargaining which this Court has characterized as a 'fundamental right. . . . ' " (*Auto. Workers v. Wis. Board* (1949) 336 U.S. 245, 259 [93 L.Ed. 651, 666, 69 S.Ct. 516].)

Further, the federal ban on public employee strikes has been specifically upheld as constitutionally permissible. (See *United Federation of Postal Clerks v. Blount, supra,* 325 F.Supp. 879, 884; affd. (1971) 404 U.S. 802 [30 L.Ed.2d 38, 92 S.Ct. 80].) In the absence of any explicit constitutional protection of the right to strike, the *Blount* court reasoned that the law prohibiting only public employees from striking need only have a rational basis to avoid offending constitutional guarantees. The court then easily found that the common law policy justifications (discussed in detail above) did indeed provide a rational basis for the per se prohibition. (See, *United Federation of Postal Clerks v. Blount, supra,* at p. 883.)

Thoughtful judges and commentators, however, have questioned the wisdom of upholding a per se prohibition of public employee strikes. They have persuasively argued that because the right to strike is so inextricably intertwined with the recognized fundamental right to organize and collectively bargain, some degree of constitutional protection should be extended to the act of striking in both the public and private sectors.

As Judge J. Skelly Wright declared in his concurrence in *United Federation of Postal Clerks v. Blount, supra,* "[i]f the inherent purpose of a labor organization is to bring the workers' interests to bear on management, the right to strike is, historically and practically, an important means of effectuating that purpose. A union that never strikes, or which can make no credible threat to strike, may wither away in ineffectiveness. That fact is not irrelevant to the

constitutional calculations. Indeed, in several decisions, the Supreme Court has held that the First Amendment right of association is at least concerned with essential organizational activities which give the particular association life and promote its fundamental purposes. . . . [Citations.] I do not suggest that the right to strike is co-equal with the right to form labor organizations. . . . But I do believe that the right to strike is, at least, within constitutional concern and should not be discriminatorily abridged without substantial or 'compelling' justification." (325 F.Supp. 879, 885.)

Chief Justice Roberts of the Rhode Island Supreme Court offered similar sentiments in a case involving a teachers' strike in that state: "Obviously, the right to strike is essential to the viability of a labor union, and a union which can make no credible threat of strike cannot survive the pressures in the present-day industrial world. If the right to strike is fundamental to the existence of a labor union, that right must be subsumed in the right to organize and bargain collectively. . . . The collective bargaining process, if it does not include a constitutionally protected right to strike, would be little more than an exercise in sterile ritualism. . . . I cannot agree that every strike by public employees necessarily threatens the public welfare and governmental paralysis. . . . The fact is that in many instances strikes by private employees pose the far more serious threat to the public interest than would many of those engaged in by public employees. . . . In short, it appears to me that to deny all public employees the right to strike because they are employed in the public sector would be arbitrary and unreasonable." (*School Committee v. Westerly Teachers Ass'n* (1973) Ill R.I. 96 [299 A.2d 441, 447-449], dis. opn.)

We are not persuaded that the personal freedoms guaranteed by the United States and California Constitutions confer an *absolute right* to strike,[38] but the arguments above may merit consideration at some future date. If the right to strike is afforded some constitutional protection as derivative of the fundamental right of freedom of association, then this right cannot be abridged absent a substantial or compelling justification.

**(9a)** As this court stated in *Vogel v. County of Los Angeles* (1967) 68 Cal.2d 18, 22 [64 Cal.Rptr. 409, 434 P.2d 961], which invalidated a loyalty oath requirement for public employees in this state, "even where a compelling state purpose is present, restrictions on the cherished freedom of association protected by the First Amendment and made applicable to the states by the Fourteenth Amendment must be drawn with narrow specificity. First Amendment freedoms are delicate and vulnerable and must be protected wherever possible. When government seeks to limit those freedoms on the basis of legitimate and substantial governmental purposes . . . those purposes cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. Precision of regulation is required so that the exercise of our most precious freedoms will not be unduly curtailed except to the extent necessitated by the legitimate governmental objective. (*Keyishian v. Board of*

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[38] As stated in the United States Supreme Court in *Dorchy v. Kansas:* "Neither the common law nor the Fourteenth Amendment confers the absolute right to strike." (*Dorchy v. Kansas* (1926) 272 U.S. 306, 311 [71 L.Ed. 248, 269, 47 S.Ct. 86].) Similarly, we do not find that the comparable personal freedoms guaranteed by the California Constitution confer an absolute right to strike. (See, e.g., *In re Porterfield* (1946) 28 Cal.2d 91, 114 [168 P.2d 706, 167 A.L.R. 675].)

*Regents, supra,* 385 U.S. 589, 602-603; *Elfbrandt v. Russell,* 384 U.S. 11, 15, *et seq.; N.A.A.C.P. v. Button,* 371 U.S. 415, 432-433; *Shelton v. Tucker,* 364 U.S. 479, 488; *Bagley v. Washington Township Hospital Dist., supra,* 65 Cal.2d 499, 506-509; *Fort v. Civil Service Com., supra,* 61 Cal.2d 331, 337-338.)"

**(3b)** As discussed at length above, the traditional justifications espoused in favor of a per se prohibition cannot withstand a significant degree of judicial scrutiny. Indeed, since not all public employee services are essential and many private employees perform services more vital to the public health and safety than do their counterparts in the public sector, the simplistic public/private dichotomy does not constitute a "compelling" justification for a per se prohibition of public employee strikes. Thus the constitutional arguments of defendant union and several amici cannot easily be dismissed, particularly since we will retain the limitation that public strikes may be prohibited when they threaten the public health or safety.[39]

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[39] Contrary to the characterization of our dissenting colleague, we neither applaud nor disapprove of strikes by public employees as a matter of social policy, for in the present state of the law that is not our function. The old rule in this state, to the effect that strikes by public employees are unlawful, rested expressly upon the premise that wages and conditions of employment for public employees may only be set by unilateral action of the public employer, and that collective bargaining for such employees in itself was contrary to public policy. *It is the Legislature which has removed the underpinnings from the old rule, by sanctioning a system of collective bargaining for local government employees.* At the same time, the Legislature has maintained a stony silence regarding the status of public employee strikes under the new statutory scheme. To the extent that we examine alternative justifications which have been asserted in support of a ban on such strikes, we do so only to determine whether there are any such

Since we have already concluded that the traditional per se prohibition against public employee strikes can no longer be upheld on common law grounds, we do not find it necessary to reach the issue in constitutional terms. Although we are not inclined to hold that the right to strike rises to the magnitude of a fundamental right, it does appear that associational rights are implicated to a substantial degree. As such, the close connection between

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justifications which are so compelling as to require acceptance by the courts even in the absence of legislative action. We find an affirmative answer only as regards those strikes which imperil public health or safety. As to other strikes, we conclude that the policy questions involved are highly debatable, and best left to the legislative branch in the first instance.

We find nothing in the dissenting opinion which detracts from this logic. The "cogent analysis" upon which the dissent relies for "the various rationales underlying the 'no strike' rule" (*post*, p. 610) refers nakedly to "differences in the employment relationship" between public and private sectors, and to "the preservation of a system of government in the ambit of public employment and the proscription of practices not compatible with the public employer-employee relationship." (*Id.*, at p. 611.) What the significant differences are which require a different rule, or why strikes are incompatible with the employer-employee relationship in the public sector, we are not told. Surely judicial intervention in so complex an arena requires greater justification than that.

The dissent decries also what it perceives to be the ambiguity in our rule prohibiting strikes which threaten public safety or health, and states a preference for those statutes which clearly define classes of employees who may or may not strike. The formulation we have adopted, however, is in accord with the rule in several states (*ante*, p. 585), and the dissent points to no evidence that such a rule is incapable of effective judicial administration. On the contrary, such a rule, which depends upon an assessment of public detriment from a particular strike, is entirely in accord with the traditional role of courts in equity. If the Legislature wishes to adopt a different rule, of course it may do so.

striking and other constitutionally protected activity adds further weight to our rejection of the traditional common law rationales underlying the per se prohibition. (Cf. *Environmental Planning & Information Council v. Superior Court* (1984) 36 Cal.3d 188, 195 [203 Cal.Rptr. 127, 680 P.2d 1086].)

**(6b)** We conclude that it is not unlawful for public employees to engage in a concerted work stoppage for the purpose of improving their wages or conditions of employment, unless it has been determined that the work stoppage poses an imminent threat to public health or safety. Since the trial court's judgment for damage in this case was predicated upon an erroneous determination that defendants' strike was unlawful, the judgment for damages cannot be sustained.[40]

The judgment is reversed.

Mosk, J., and Grodin, J., concurred.

**KAUS, J.**—I concur in the judgment insofar as it holds that a peaceful strike by public employees does not give rise to a tort action for damages against the union. I am aware of nothing in the Meyers-Milias-Brown Act which suggests that the Legislature intended that common law tort remedies should be applied in this context, and without such legislative endorsement I believe it is improper to import tort remedies that were devised for different situations into this sensitive labor relations arena. As this court noted in

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[40] The trial court relied upon *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977) 72 Cal.App.3d 100 [140 Cal.Rptr. 41], which held that the conduct of an illegal strike was a tort for which damages may be recovered. Since we have held that the strike in this case was not illegal, we need not consider the correctness of that decision.

*City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 917 [120 Cal.Rptr. 707, 534 P.2d 403]: "The question as to what sanctions should appropriately be imposed on public employees who engage in illegal strike activity is a complex one which, in itself, raises significant issues of public policy. In the past, several states have attempted to deter public employee strikes by imposing mandatory draconian statutory sanctions on striking employees; experience has all too frequently demonstrated, however, that such harsh, automatic sanctions do not prevent strikes but instead are counterproductive, exacerbating employer-employee friction and prolonging work stoppages." In the absence of a determination by the Legislature that a tort action, resulting in a money damage award determined by a jury many years after the strike, is the appropriate method for dealing with public employee strikes, I do not believe the judiciary should, on its own, embrace this "solution" to the problem. (See, e.g., *Lamphere Sch. v. Lamphere Fed. of Teachers* (1977) 400 Mich. 104 [252 N.W.2d 818, 827-832, 84 A.L.R.3d 314]; *City of Fairmont v. Retail, Wholesale, etc.* (W.Va. 1980) 283 S.E.2d 589, 592-595; contra *State v. Kansas City Firefighting Local 42* (Mo.App. 1984) 672 S.W.2d 99, 107-116.) I would therefore disapprove the contrary holding in the *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977) 72 Cal.App.3d 100, 111-114 [140 Cal.Rptr. 41].

In concluding that a common law tort action does not lie in these circumstances, it is not necessary to determine whether such a strike is "legal" or "illegal" in an abstract sense, or whether, and under what circumstances, such a strike could properly be enjoined. The question of injunctive relief presents significantly different considerations than the propriety of a tort action, and it is not before

us in this case. We should await the facts of a concrete dispute before we attempt to resolve it.

Finally, I believe it is equally unwise to venture an opinion on potential constitutional challenges to future legislative action in this field. In my view, we should—if anything—be encouraging the Legislature to attempt to deal with the difficult public policy questions in this area, not frightening it away with premature warnings of possible constitutional minefields.

Reynoso, J., concurred

**BIRD, C.J.,** Concurring.-**(1b), (2b), (3c), (4b), (5b), (6c), (7b), (8b), (9b)** I write separately because I believe it is only fair to give the Legislature some guidance in an area filled with constitutional problems. To prompt the Legislature to enter this field without such guidance[1] not only invites error but encourages it. Such a practice is not only disingenuous, it is disrespectful to the litigants and knowingly misleads the public.

Today's decision brings the law of public employee strikes into the 20th century and makes the common law contemporary. As the court has explained, the flat prohibition against such strikes was grounded in outmoded notions of sovereignty and unreasoned fears of free labor organization.

It is appropriate that today's affirmation of the right to strike should come so soon after the tragic events surrounding the strike of Solidarity, the Polish labor union. The Solidarity strikers proclaimed that the rights to organize collectively and to strike for dignity and better treatment on the job were fundamental human freedoms. When the Polish government declared martial law and supressed the union in December 1981, Americans especially mourned the loss of these basic liberties.

The public reaction to the Solidarity strike revealed the strength of the American people's belief that the right to strike is an essential feature of a free society. In an economy increasingly dominated by large-scale business and govern-

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[1] See concurring opinions of Grodin, J. and Kaus, J. See also *In re Misener* (1985) *ante*, page 543 [___ Cal.Rptr. ___, ___ P.2d ___] and its antecedent, *People v. Collie* (1981) 30 Cal.3d 43 [177 Cal.Rptr. 458, 634 P.2d 534, 23 A.L.R.4th 776], which graphically illustrate this very problem.

mental organizations, the right of employees to withhold their labor as a group is an essential protection against abuses of employer power. (See, e.g., *Amer. Foundries v. Tri-City Council* (1921) 257 U.S. 184, 209 [66 L.Ed. 189, 199, 42 S.Ct. 72, 27 A.L.R. 360].) Hence, it is widely presumed that "we have the right as free men to refuse to work for just grievances: the strike is an unalienable weapon of any citizen." (Reagan & Hubler, Where's the Rest of Me? (1965) p. 138.)

The majority opinion suggests that the right to strike may have constitutional dimensions. (Maj. opn., *ante*, at pp. 589-591.) I write separately to elaborate on this point. Although the right to strike has a long history in American jurisprudence, its textual and theoretical foundations have eluded a comprehensive analysis. Instead, the courts have danced a minuet around the issue. The time has come to make explicit that which has so frequently been presumed. If the right to strike does indeed differentiate this country from those that are not free, then it must be given substance and enforced.

The constitutional right to strike rests on a number of bedrock principles: (1) the basic personal liberty to pursue happiness and economic security through productive labor (U.S. Const., 5th and 14th Amends.; Cal. Const., art.I, §§ 1, 7, subd. (a)); (2) the absolute prohibition against involuntary servitude (U S. Const., 13th Amend.; Cal. Const., art. I, § 6; and (3) the fundamental freedoms of association and expression (U.S. Const., 1st Amend.; Cal. Const., art. I, §§ 2, subd. (a), 3).

It is beyond dispute that the individual's freedom to withhold personal service is basic to the constitutional concept of "liberty." Without this freedom, working people would be at the total mercy of their employers, unable

either to bargain effectively or to extricate themselves from an intolerable situation. Such a condition would make a mockery of the fundamental right to pursue life, liberty and happiness by engaging in the common occupations of the community. (See *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351]; see also *Nash v City of Santa Monica* (1984) 37 Cal.3d 97, 110 [207 Cal.Rptr. 285, 688 P.2d 894] (conc. and dis. opn. of Bird, C.J.) [right to withhold personal service as a landlord is constitutionally protected liberty interest]; *id.*, at p. 114 (dis. opn. of Mosk, J.) [same]; cf. U.S. Const., 13th Amend. [prohibiting involuntary servitude]; Cal. Const., art. I, § 6 [same].)

Nevertheless, in the early years of this country, the concerted withholding of labor was outlawed under the doctrine of "criminal conspiracy." (See Frankfurter & Greene, The Labor Injunction (1930) pp. 2-3, and cases cited.) Although workers—with the exception of chattel slaves—enjoyed the right to leave employment as individuals, they were prohibited from doing so as a group. (*Ibid.*) Apparently, the courts assumed that working people could adequately protect their liberty interests by exercising their personal right to terminate employment and compete as individuals in the labor market.

As Archibald Cox has written, "[s]ome of the major problems of constitutional law . . . arise from the necessity of shaping guarantees born of an individualistic society to the conditions resulting from the solidarity of organized groups." (Cox, *Strikes, Picketing and the Constitution* (1951) 4 Vand.L.Rev.574, 579 [hereafter Cox].) The recognition of group rights for laborers trailed behind the

legal acceptance of the modern business corporation, a group form of property ownership.[2]

The right to strike was initially regarded as labor's counterpart to the massive economic power concentrated in the corporation. With the rise of monolithic business enterprises, it could no longer be maintained that employees' freedom to compete in the labor market as individuals would be sufficient to protect their liberty interests. In a famous dissenting opinion, Justice Oliver Wendell Holmes observed: "One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way." (*Vegelahn v. Guntner* (Mass. 1896) 44 N.E. 1077, 1081 (dis. opn. of Holmes, J.).)

In Holmes's view, the right to strike was integral to this latter combination: "If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same

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[2] The modern form of corporate organization, which grants the corporate management broad powers to act on behalf of shareholders, emerged in the latter part of the 19th century. (See generally, Berle & Means, The Modern Corporation and Private Property (1939) pp. 127-152.) During the 1890's, the United States Supreme Court ruled that corporations possess constitutional rights. (See, e.g., *Chicago, &c. Railway Co. v Minnesota* (1890) 134 U.S. 418 [33 L.Ed. 970, 10 S.Ct. 462] ["liberty"]; *Smyth v. Ames* (1898) 169 U.S. 466 [42 L.Ed. 819, 18 S.Ct. 418] ["property"].)

liberty that combined capital has, to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control." (*Vegelahn v. Guntner, supra,* 44 N.E. at p 1081.)

This theoretical foundation was later adopted by the United States Supreme Court. In an opinion by Chief Justice Taft, the court declared: "[Unions] were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has, in many years, not been denied by any court." (*Amer. Foundries v. Tri-City Council, supra,* 257 U.S. at p. 209 [66 L.Ed. at p. 199].)

A few years later the high court, with Chief Justice Hughes writing, asserted that the right of employees to engage in "collective action" was "not to be disputed." (*Texas & N.O.R. Co. v. Ry. Clerks* (1930) 281 U.S. 548, 570 [74 L.Ed. 1034, 1046, 50 S.Ct. 427].) Finally, the court proclaimed that employees' rights of self-organization were "fundamental" in nature. (*Labor Board v. Jones & Laughlin (1937) 301 U.S. 1, 33* [*81 L.Ed. 893, 909, 57 S.Ct. 615, 108 A.L.R. 1352*].)

Though these forceful statements suggest that the Supreme Court included the right to strike among those liberties protected by the Constitution, that proposition was never squarely asserted. Instead, a federal district court was the first to define the right in unambiguous terms: "The right to peaceably strike or to participate in one, to work or refuse to work, and to choose the terms and conditions under which one will work, like the right to make a speech, are fundamental human liberties which the state may not condition or abridge in the absence of grave and immediate danger to the community." (*Stapleton v. Mitchell* (D.Kan. 1945) 60 F.Supp. 51, 61, app. dism. by stip., 326 U.S. 690 [90 L.Ed. 406, 66 S.Ct. 172] [invalidating a Kansas law that prohibited various labor activities, including strikes]; see also *Alabama State Federation of Labor v. McAdory* (1944) 246 Ala. 1 [18 So.2d 810, 827-828] [striking down Alabama law that prohibited all strikes not endorsed by a majority of the struck employer's employees].)

The status of the right to strike as a constitutionally protected "liberty" arises not only from the considerations of fairness set forth by Justice Holmes and Chief Justices Taft and Hughes, but also from the inherent nature of work. In the words of Justice Felix Frankfurter, "[t]he coming of the machine age tended to despoil human personality. It turned men and women into 'hands.' The industrial history of the early Nineteenth Century demonstrated the helplessness of the individual employee to achieve human dignity in a society so largely affected by technological advances. Hence the trade union made itself increasingly felt, not only as an indispensable weapon of self-defense on the part of workers but as an aid to the well-being of a society in which work is an expression of life and not merely the means of earning subsistence." (*A.F. of L. v. American Sash Co. (1949) 335 U.S. 538, 542-543* [*93 L.Ed.*

*222, 225, 69 S.Ct. 258, 6 A.L.R.2d 481] (conc. opn. of Frankfurter, J.).)*

Perhaps in response to this concern, some courts—including a California Court of Appeal—adopted an absolutist position, recognizing no distinction whatever between the rights of employees to quit work as individuals or in a group: "It is the right of every man to engage to work for or to deal with, or to refuse to work for or to deal with, any man or class of men as he sees fit, whatever his motive or whatever the resulting injury, without being held in any way accountable therefor. [Citations.] These rights may be exercised in association with others so long as they have no unlawful object in view." (*Overland P. Co. v. Union L. Co.* (1922) 57 Cal.App. 366 370-371 [207 P. 412]; see also Tobriner, *The Organizational Picket Line: Lawful Economic Pressure* (1951) 3 Stan.L.Rev. 423, 426, fn. 16 [in spite of four separate opinions, the decision of this court in *Parkinson Co. v. Bldg. Trades Council* (1908) 154 Cal. 581 [98 P. 1027] rests on the absolute right of a labor union to strike].)

It has been argued that constitutional protection for strike activities would intrude on the legislative function. The courts have exercised restraint in applying the constitutional guarantee of "liberty" to legislative determinations of economic policy. This restraint reflects the fear that the diffuse concept of liberty could be employed as a device for the imposition of judicial policy judgments. (See *Lochner v. New York* (1905) 198 U.S. 45, 74-76 [49 L.Ed. 937, 948-949, 25 S.Ct. 539] (dis. opn. of Holmes, J.).)

Nevertheless, the mere fact that an enactment covers economic matters does not insulate it from scrutiny where an important constitutional guarantee is implicated. The Constitution expressly protects certain rights of "property."

(U.S. Const., 5th and 14th Amends.; Cal. Const., art. I §§ 1, 7, subd.(a).) As Professor Cox has observed, "[a] constitution which assures the owner of property an opportunity to obtain a reasonable return on his capital must recognize the worker's interest in the conditions under which he labors and the price he receives for his work." (Cox, *supra*, 4 Vand.L.Rev.at p. 580.)

Furthermore, recognition of the right to strike does not require an unconstrained judicial construction of the term "liberty." The courts can find constitutional guidance in the close nexus between the right to strike and a specific constitutional provision: the ban on involuntary servitude. (U.S. Const., 13th Amend.; Cal. Const., art. I, § 6.) Though this provision might not by itself guarantee the right to strike, it does provide clear support for the proposition that the strike is an exercise of constitutionally protected liberty.

Justice Brandeis once declared, in a case involving a peaceful, concerted refusal to work: "If, on the undisputed facts of this case, refusal to work can be enjoined, Congress [has] created . . . an instrument for imposing restraints upon labor which reminds of involuntary servitude." (*Bedford Co. v. Stone Cutters Assn.* (1927) 274 U.S. 37, 65 [71 L.Ed. 916, 928, 47 S.Ct. 522, 54 A.L.R. 791] (dis. opn. of Brandeis, J., joined by Holmes, J.); see also *France Packing Co. v. Dailey* (3d Cir. 1948) 166 F.2d 751, 758 (dis. opn. of O'Connell, J.) [construing War Labor Disputes Act to permit voluntary strikes in view of the constitutional ban on involuntary servitude].) Some courts have invalidated antistrike restrictions as inconsistent with the ban on involuntary servitude. (See e.g., *Henderson v. Coleman* (1942) 150 Fla. 185 [7 So.2d 117, 121]; *United States v.*

*Petrillo* (N.D.Ill. 1946) 68 F.Supp. 845, 849, revd. (1947) 332 U.S. 1 [91 L.Ed. 1877, 67 S.Ct. 1538].)[3]

The close connection between the right to strike and the prohibition against involuntary servitude derives from the purposes of the 13th Amendment. That amendment guarantees the freedom to terminate employment not for its own sake, but in order to "prohibit[ ] that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude." (*Bailey v. Alabama* (1911) 219 U.S. 219, 241 [55 L.Ed. 191, 201, 31 S.Ct. 145].)

Accordingly, the amendment is concerned not merely with the formal right to quit, but also with the *practical ability of working people to protect their interests in the workplace*: "[I]n general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work." (*Pollock v. Williams* (1944) 322 U.S. 4, 18 [88 L.Ed. 1095, 1104, 64 S.Ct. 792]; see generally, Cox, *supra*, 4 Vand.L.Rev. at p. 576.)

As courts and commentators universally acknowledge, the group right to strike has replaced the individual right to "change employers" as the principal defense of working people against oppressive conditions. The rise of multinational corporations and large-scale government has

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[3] In *Petrillo*, the Supreme Court reversed the district court's holding as to involuntary servitude solely on the ground that the restriction at issue did not—on its face—prohibit strike activities. (*United States v. Petrillo, supra*, 332 U.S. at pp. 12-13 [91 L.Ed. at pp. 1885-1886].)

produced a corresponding decrease in the practical significance of the right to quit for the individual. To withdraw the right to strike is to deprive the worker of his or her only effective bargaining power. (See maj. opn., *ante*, at pp. 589-590; see also Burton & Krider, *The Role and Consequences of Strikes by Public Employees* (1970) 79 Yale L.J. 418, 419-420, and sources cited.) This undeniable fact is reflected in the intensity of the public reaction to the suppression of the Solidarity strike.

Over 30 years ago, the question of whether the 13th Amendment protects the right to strike was termed "momentous" by two justices of the United States Supreme Court. (*A.F. of L. v. American Sash Co., supra*, 335 U.S. at p. 559 [93 L.Ed. at p. 234] (conc. opn. of Rutledge, J., joined by Murphy, J.) [expressly reserving judgment on the question].) Yet, that court has never squarely addressed the issue.[4]

The notion of a 13th Amendment right to strike has been rejected by some lower federal courts and state courts.

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[4] The court came closest to confronting the issue in *Auto. Workers v. Wis. Board* (1949) 336 U.S. 245 [93 L.Ed. 651, 69 S.Ct. 516]. In that case, a union had conducted a series of "union meetings" at irregular times during work hours. The Wisconsin Employment Relations Board issued an order prohibiting any "concerted effort to interfere with production of the complainant *except by leaving the premises in an orderly manner for the purpose of going on strike.*" (*Id.*, at p. 250 [93 L.Ed. at p. 661], italics added.) The court sustained the order against a 13th Amendment challenge. Whatever the merits of this conclusion (see *id.*, at p. 269 [93 L.Ed. at p. 671] (dis. opn. of Murphy, J.) [the majority find the union's tactic objectionable only because it is effective), it is clear that the court did not decide the general question of whether the 13th Amendment guaranteed the right to strike: "Our only question is . . . whether it is beyond the power of the State to prohibit the particular course of conduct described." (*Id.*, at p. 251 [93 L.Ed. at p. 661].)

These courts have relied on two lines of reasoning. First, some have suggested that the prohibition against involuntary servitude protects only the right of employees to withhold personal services as individuals. (See, e.g., *Western Union Tel. Co. v. International B. of E. Workers* (N.D.Ill. 1924) 2 F.2d 993, 994-995, affd. (7th Cir. 1925) 6 F.2d 444 [46 A.L.R. 1538].) However, as explained above, this line of argument cannot justify the total nonprotection of strike activities in an economy dominated by large and powerful employers. (See *ante*, at p. 598-599.)

Other courts have held that the 13th Amendment does not protect a *temporary* withholding of labor. (See, e.g., *Dayton Co. v. Carpet, Linoleum and Resilient Fl. D., etc.* (1949) 229 Minn. 87 [39 N.W.2d 183, 197-198], app. dism., (1950) 339 U.S. 906 [94 L.Ed. 1334, 70 S.Ct. 570].) However, in view of the purposes of the prohibition on involuntary servitude, "can it matter whether the worker quits permanently or merely leaves the establishment until conditions are changed? In the former case he may be said to be exercising the right to sell his services to the highest bidder, leaving others to take his former job, while in the latter case he is seeking to injure the employer by cutting off the supply of labor. But this reasoning scarcely justifies a constitutional distinction, for in either case the improvement of employment conditions ultimately depends upon a withholding of labor from marginal employers until they offer more .... [T]he temporary or permanent character of the quitting seems irrelevant." (Cox, *supra*, 4 Vand.L.Rev. at pp. 576-577.)

More fundamentally, it is not suggested here that the prohibition on involuntary servitude standing alone necessarily guarantees the right to strike. That provision does, however, provide ample support for the proposition

that the right to strike must be counted among those constitutionally protected "liberties" that are essential to human freedom.

The concerted withholding of labor warrants protection not only as an exercise of personal liberty, but also as an incident of the fundamental freedoms of association and expression. (U.S. Const., 1st Amend.; Cal. Const., art. I, §§ 2, 3.) As the majority point out, the right of workers to combine and exert " 'various forms of economic pressure' " on employers is constitutionally protected. (Maj. opn., *ante*, at p. 588, quoting *In re Blaney* (1947) 30 Cal.2d 643, 647-648 [184 P.2d 892].)

Working people enjoy the constitutional right to form and join unions. (See, e.g., *Orr v. Thorpe* (5th Cir. 1970) 427 F.2d 1129, 1131; *American Federation of State, Co., & Mun. Emp. v. Woodward* (8th Cir. 1969) 406 F.2d 137, 139-140.) Without a constitutionally protected right to strike, the use of these freedoms would be "little more than an exercise in sterile ritualism." (*School Committee v. Westerly Teachers Ass'n* (1973) 111 R.I. 96 [299 A.2d 441, 448] (dis. opn. of Roberts, C.J.); see also *United Federation of Postal Clerks v. Blount* (D.D.C. 1971) 325 F.Supp. 879, 885 (conc. opn. of Wright, J.), aff'd. mem. 404 U.S. 802 [30 L.Ed.2d 38, 92 S.Ct. 80].)

Recent decisions concerning consumer boycotts provide persuasive authority for the protection of strikes under the guarantees of free association and expression.[5] Consumer boycotts were, like strikes, originally prohibited at common

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[5] A boycott is an organized refusal to deal. (See Note, *Political Boycott Activity and the First Amendment* (1978) 91 Harv.L.Rev. 659.) A strike is one form of boycott—i.e., an organized refusal by workers to provide labor.

law. (See generally, Note, *Political Boycott Activity and the First Amendment, supra,* 91 Harv.L.Rev. at pp. 676-677.)

However, in a series of cases involving consumer boycotts by civil rights advocates, the courts began to recognize that such boycotts, like strikes, provide a necessary counterweight to entrenched economic power. In 1948, Justice Roger Traynor observed that "[i]n their struggle for equality the only effective economic weapon Negroes have is the purchasing power they are able to mobilize to induce employers to open jobs to them . . .. Only a clear danger to the community would justify judicial rules that restrict the peaceful mobilization of a group's economic power to secure economic equality." (*Hughes v. Superior Court* (1948) 32 Cal.2d 850, 868 [198 P.2d 885] (dis. opn. of Traynor, J.), affd. (1950) 339 U.S. 460 [94 L.Ed. 985, 70 S.Ct. 718]; see also *Garner v. Louisiana* (1961) 368 U.S. 157, 201 [7 L.Ed.2d 207, 239, 82 S.Ct. 248] (conc. opn. of Harlan, J.) [the First and Fourteenth Amendments protect sit-ins called to protest the racial practices of private businesses].)

In *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 907-915 [73 L.Ed.2d 1215, 1232-1238, 102 S.Ct. 3409] (hereafter *Claiborne Hardware),* the United States Supreme Court held that a peaceful, politically motivated boycott constituted an exercise of the constitutional freedoms of association and expression. In that case, black citizens of Port Gibson, Mississippi, boycotted white-owned businesses to pressure those businesses and elected public officials to implement policies of racial equality. (*Id.,* at pp. 898-900 [73 L.Ed.2d at pp. 1226-1228]; *N.A.A.C.P. v. Claiborne Hardware Co.* (Miss. 1980) 393 So.2d 1290, 1295-1297.) The Mississippi Supreme Court affirmed the trial court's holding that the boycotted businesses were entitled to injunctive and monetary relief. (*Id.,* at pp. 1293,1302.)

The United States Supreme Court reversed. (*Claiborne Hardware, supra,* 458 U.S. at p. 934 [73 L.Ed.2d at p. 1249].) The court rejected the common law view that boycotts were devoid of constitutional value by virtue of their coercive nature. "Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." (*Id.,* at p. 910 [73 L.Ed.2d at p. 1234].) On the contrary, the boycott was entitled to protection as an effective and nonviolent means of bringing about political, social, and economic change. (*Id.,* at pp. 907-915 [73 L.Ed.2d at pp. 1232-1238].) Accordingly, "[t]he right of the States to regulate economic activity could not justify a complete prohibition" against the boycott. (*Id.,* at p. 914 [73 L.Ed.2d at p. 1237].)[6]

This court has recently had occasion to apply the principles announced in *Claiborne Hardware.* In *Environtal Planning & Information Council v. Superior Court*

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[6] The court's analysis covered both the boycott itself and the expressive activities used to sustain and expand it. (*Claiborne Hardware, supra,* 458 U.S. at pp. 907-912 [73 L.Ed.2d at pp. 1232-1236].) A boycott is at once a form of association and a means of expression. The decision to boycott results from processes of assembly and debate. (See, e.g., *id.,* at p. 907 [73 L.Ed.2d at p. 1232].) Once commenced, the boycott is a form of symbolic expression. Most obviously, it forcefully communicates the participants' views to the target. Further, as a newsworthy event, the boycott provides the participants with a platform for explaining and advocating their views to the public. They pay for this platform by foregoing the benefits of trade or employment. (Compare *Citizens Against Rent Control v. Berkeley* (1981) 454 U.S. 290, 296 [70 L.Ed.2d 492, 498-499, 102 S.Ct. 434] [the contribution and expenditure of money are essential to effective advocacy since the means for communicating with the public are costly].) In short, the boycott is a nonviolent method of conveying not only the content but also the intensity of the participants' views.

(1984) 36 Cal.3d 188 [203 Cal.Rptr. 127, 680 P.2d 1086] (hereafter *Environmental Planning*), an environmental group sought to influence a newspaper's editorial policies by boycotting businesses that advertised in the newspaper. The newspaper's publisher brought suit claiming tortious interference with an economic relationship.

This court rejected the publisher's argument that only civil rights boycotts should be accorded constitutional protection: "As in *Claiborne Hardware*, . . .[the boycotters'] activities constitute a 'politically motivated boycott designed to force governmental and economic change' (458 U.S. at p. 914 [ ]), and the fact that the change which they seek bears upon environmental quality rather than racial equality, can hardly support a different result." (*Environmental Planning, supra*, 36 Cal.3d at p. 197.) Applying common law principles in light of federal and state constitutional guarantees, the court held that the environmental group was engaging in lawful activity. (*Id.*, at pp. 197-198.)

I see no principled basis for granting protection to "politically motivated" consumer boycotts while withdrawing protection from labor boycotts. In *Environmental Planning*, this court expressly reserved the question whether *Claiborne Hardware's* apparent distinction between political and labor boycotts reflects the dictates of the California Constitution. (36 Cal.3d at p. 198, fn. 9.) The prior decisions both of this court and of the United States Supreme Court indicate that labor boycotts should be entitled to full constitutional protection.

Differential treatment of political and labor activity runs afoul of the well-established principle of judicial impartiality among speakers and messages. "Of course, it is immaterial whether the beliefs sought to be advanced by

association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." (*N.A.A.C.P. v. Alabama* (1958) 357 U.S. 449, 460-461 [2 L.Ed.2d 1488, 1498-1499, 78 S.Ct. 1163], quoted by the majority, *ante*, at p. 587, fn. 37; see also *Environmental Planning, supra*, 36 Cal.3d at p. 197).

Similarly, labor unions are entitled to no less protection than civil rights organizations and environmental groups. "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." (*First National Bank of Boston v. Bellotti* (1978) 435 U.S. 765, 777 [55 L.Ed.2d 707, 718, 98 S.Ct. 1407].)

If these principles of judicial neutrality held sway without qualification, the political-labor distinction could be rejected without further discussion. However, as this court has recognized, "commercial" expression is accorded a lowered level of protection. (See *Environmental Planning, supra*, 36 Cal.3d at p. 197; accord *Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 64 [77 L.Ed.2d 469, 476, 103 S.Ct. 2875, 2879].)

The United States Supreme Court has defined commercial speech alternately as "speech which does 'no more than propose a commercial transaction' " (*Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S.748, 762 [48 L.Ed.2d 346, 358, 96 S.Ct. 1817]) or "expression related solely to the economic interests of the speaker and its audience" (*Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557, 561 [65 L.Ed.2d 341,348, 100 S.Ct. 2343]). Labor expression cannot be reduced to such narrow

concerns. It should not be relegated to the lowered protection accorded commercial expression.

Labor disputes cover a broad range of issues, many of which involve basic concerns of liberty. "A collective bargaining agreement is an effort to erect a system of industrial self-government." (*Steelworkers v. Warrior & Gulf Co.* (1960) 363 U.S. 574, 580 [4 L.Ed.2d 1409, 1416, 80 S.Ct. 1347].) For the bulk of each day, working people are subject to the codes of conduct that govern their workplaces. Those codes—whether embodied in collective bargaining agreements, employer rule books, or informal practices—govern matters ranging from race relations to permission to use the bathroom. (See generally, Shulman, *Reason, Contract, and Law in Labor Relations* (1955) 68 Harv.L.Rev. 999, 1002-1008 [hereafter Shulman]; Cox, *Reflections Upon Labor Arbitration* (1959) 72 Harv.L.Rev. 1482, 1490.) While on the job, working people feel the force of these rules more immediately and directly than those of the government.

Herein lies the link between the guarantee of personal liberty, as informed by the ban on involuntary servitude, and the freedoms of association and expression. The issues that arise in the workplace rival those addressed in the political process in their actual impact on the breadth of liberty enjoyed by working people. The strike is an essential weapon in the worker's defense against "that control by which the personal service of one man is disposed of or coerced for another's benefit . . .." (*Bailey v. Alabama, supra,* 219 U.S. at p. 241 [55 L.Ed. at p. 201]; see *ante,* at pp. 598-599. And, it is a weapon that employs the constitutionally favored methods for promoting change: peaceful association and expression. (See *ante,* at p. 602 & fn. 6.) Surely, the Constitution protects the efforts of

working people to preserve and expand their liberties by means of nonviolent—albeit outspoken and impolite—forms of association and expression. (Cf. *Claiborne Hardware, supra,* 458 U.S. at pp. 907-912 [73 L.Ed.2d at pp. 1232-1236].)

As the Polish strikers discovered, a free labor organization cannot coexist with political tyranny. The converse is no less true: "Collective bargaining is today, as Brandeis pointed out, the means of establishing industrial democracy as the essential condition of political democracy, the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens." (Shulman, *supra,* 68 Harv.L.Rev. at p. 1002.)[7]

The fact that unions and their members seek increased compensation as well as greater liberty does not lower the expression of their grievances to the level of commercial speech. In the words of Congress, "[t]he labor of a human being is not a commodity or article of commerce." (15 U.S.C. § 17.) Unlike the sale of a commodity, the sale of labor gives rise to rights of control over a person's time and activity. The employer obtains not only the product of the employee's labor, but also considerable power to dictate when and how the work will be performed. (See generally, Dept. of Health, Ed. & Welf., Work in America (1973) [hereafter HEW Report].) The amount of compensation is, in part, a tradeoff for personal subordination. This feature of wages and benefits explains why the 13th Amendment, a guarantee of personal liberty, is concerned with "the

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[7] The Constitution does not mandate collective bargaining. Whatever the particular system of labor relations, a degree of liberty in the employment relationship is essential to democracy.

defense against oppressive hours, pay [and] working conditions." (*Pollock v. Williams, supra* ,322 U.S. at p. 18 [88 L.Ed. at p. 1104].)[8]

In short, the asserted political-labor distinction provides no basis for denying to working people and unions the protection afforded civil rights activists and environmentalists. Accordingly, a restraint on the right to strike should be upheld under the California Constitution only if it serves a compelling state interest by the least restrictive means.[9]

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[8] Over a century ago, John Stuart Mill eloquently expressed a view of liberty in the employment relation: "Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing." (Mill, On Liberty (Shields edit. 1956) p. 72.) More recently, it has been widely recognized that issues relating to authority and work content are of central importance in labor relations. (See, e.g., HEW Report; Hill, Competition and Control at Work (1982) pp. 16-44; Hirszowicz, Industrial Sociology (1982); Work in America: The Decade Ahead (Kerr & Rosow edits. 1979); Martin, Contemporary Labor Relations (1979) pp. 125-129; Tepperman, Not Servants Not Machines: Office Workers Speak Out (1976); Case Studies on the Labor Process (Zimbalist edit. 1979).) Whatever one's views on the question of personal liberty in the workplace, it is clear that debate and controversy over that issue cannot be reduced to the status of purely "commercial" speech.

[9] The notion that the United States Constitution protects the right to strike was rejected by a two-judge majority in *United Federation of Postal Clerks v. Blount, supra,* 325 F.Supp. 879, aff'd. mem. 404 U.S. 802 [30 L.Ed.2d 38, 92 S.Ct. 80] (hereafter *Blount*). However, the California Constitution possesses independent vitality. (See, e.g., *Serrano v. Priest* (1976) 18 Cal.3d 728, 764-766 [135 Cal.Rptr. 345, 557 P.2d 929].) Hence, *Blount* is not binding authority as to the state constitutional claim. Nor did the *Blount* court provide any persuasive reasoning in support of its holding.

First, the *Blount* court erroneously suggested that since the common law provided no protection for strikes, neither did the United States

Constitution. (*Blount, supra,* 325 F.Supp. at p. 882.) The court did not have the benefit of the *Claiborne Hardware* decision, which held that a consumer boycott was constitutionally protected in spite of the fact that such boycotts had been prohibited under the common law. (458 U.S. at pp. 907-915 [73 L.Ed.2d at pp. 1232-1238].) Moreover, this court today overturns the common law ban on public employee strikes in this state.

Next, the court asserted that the right to strike was fully protected for the first time by section 7 of the National Labor Relations Act (NLRA). (*Blount, supra,* 325 F.Supp. at p. 882.) However, as the Chief Justice of the Rhode Island Supreme Court has explained, the NLRA presumed that working people already possessed the right to strike: "The fact is that § 7 of that act makes no mention of the right to strike. In § 13 thereof reference is made to the right to strike as follows: 'Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.' Obviously, § 13 is a rule of construction. [Citation.] It is my opinion that the NLRA recognized the rights which labor already had and was intended to afford those rights extensive legislative protection." (*School Committee v. Westerly Teachers Ass'n, supra,* 299 A.2d at p. 447 (dis. opn. of Roberts, C.J.)

Nowhere did the *Blount* court address the concerns set forth in the present opinion.

Other federal authorities are no more persuasive. In two cases decided prior to *Claiborne Hardware, supra,* 458 U.S. 886, the Supreme Court summarily rejected First Amendment claims by labor unions. (See *NLRB v. Retail Store Employees* (1980) 447 U.S. 607, 616 [65 L.Ed.2d 377, 385-386, 100 S.Ct. 2372] [upholding restriction on peaceful consumer boycott picketing]; *Longshoremen v. Allied International, Inc.* (1982) 456 U.S. 212, 226-227 [72 L.Ed.2d 21, 32, 102 S.Ct. 1656] [upholding prohibition against longshoremen refusing to handle cargo bound to or from the Soviet Union].) However, in each case, the court provided only one paragraph of explanation, relying mainly on the "coercive" nature of boycott activities. The subsequent decision in *Claiborne Hardware* undercut this reasoning. Peaceful boycott activities were held protected in spite of their coercive aspects. (458 U.S. at p. 910 [73 L.Ed.2d at p. 1234].) Clearly, there is no principled basis for refusing to apply this approach in the labor context. (See *ante,* at

The right to strike must be guaranteed to public and private employees alike. In accepting public employment, individuals do not thereby sacrifice their constitutional rights. (See e.g., *Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal.2d 499, 503-505 [55 Cal.Rptr. 401, 421 P.2d 409].) The constitutional guarantees of personal liberty, freedom of association, and freedom of expression are no less important to public workers than to other working people.

At one time, the ban on public employee strikes might have been described as a limited exception to the general right to strike. However, between 1930 and 1970, public employees increased from about 3.2 million to more than 13 million. As a percentage of the work force, public employment rose from approximately 6.5 percent to over 15 percent, with state and local workers accounting for most of the increase.[10] There would be an obvious inconsistency

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pp. 602-605; see also Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole* (1984) 11 Hastings Const. L.Q. 189, 232-246; Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression* (1984) 43 Maryland L.Rev.4, 12-19; Harper, *The Consumer's Emerging Right to Boycott: NAACP v. Claiborne Hardware and Its Implications for American Labor Law* (1984) 93 Yale L.J. 409 [hereafter Harper]; Note, *Labor Picketing and Commerical Speech: Free Enterprise Values in the Doctrine of Free Speech* (1982) 91 Yale L.J. 938; Note, *Peaceful Labor Picketing and the First Amendment* (1982) 82 Colum.L.Rev. 1469.)

[10] These figures were compiled from [illegible] States Department of Commerce's Statistical Abstract of the United States, page 303, table No. 487 (1984) [hereafter Statistical Abstract]; 1 United States Department of Commerce, Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970 (1975) Series D 11-25, page 127; 2 United States Department of Commerce, Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, *supra*, Series Y

were this court to recognize that the right to strike is essential to a free society while denying that right to a significant proportion of the working population.

It has been argued that public employee strikes lack constitutional protection since they enable public workers to exercise a disproportionate influence on the political process. In this view, the principles announced in *Claiborne Hardware* should appply only to consumer boycotts. The power to withhold patronage is said to be less dangerous than the power to withhold labor because consumer power is more widely dispersed. (See generally Harper, *supra*, 93 Yale L.J. at pp. 426-427.)

However, as the present majority opinion explains, the coercive potential of public employee strikes is sharply limited by economic and political conditions. Many government services can be foregone over substantial periods without serious harm. Others can be contracted out to private industry. Where services are financed by user fees, the users can exert effective pressure against the strikers. Last but not least, the taxpaying public in general frequently mounts effective opposition to public employee strikes. (See maj. opn., *ante*, at pp. 578-579.)

On a deeper level, the constitutional considerations behind the right to strike are, if anything, more compelling than those supporting the right to withhold patronage. Consumer boycotts, unlike strikes, do not implicate either the fundamental liberty to pursue happiness through labor or the prohibition against involuntary servitude. (See *ante*, at pp. 596-600.)

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272-289, page 1100, Series Y 308-317, page 1102, Series Y 332-334, page 1104.

Furthermore, the argument of "disproportionate" political influence is untenable in view of the United States Supreme Court's treatment of monetary wealth, perhaps the most concentrated form of economic power.[11] Restrictions on political expenditures and contributions are subject to strict judicial scrutiny. (*Buckley v. Valeo* (1976) 424 U.S. 1, 15-19, 58-59, [46 L.Ed.2d 659, 685-688, 710, 96 S.Ct. 612].) Corporations as well as individuals enjoy the right to employ concentrated wealth in the political process. (*First National Bank of Boston v. Bellotti, supra,* 435 U.S. at pp. 777, 789-792 [55 L.Ed.2d at pp. 725-728].)

In *Citizens Against Rent Control v. City of Berkeley, supra,* 27 Cal.3d 819, this court addressed the constitutionality of a Berkeley city ordinance that prohibited contributions of more than $250 per person to committees formed to support or oppose a ballot measure. The court held that the ordinance was necessary to serve the compelling governmental interest in preventing well-financed special interest groups from dominating the referendum process. (*Id.*, at pp. 825-829, 832.)

The United States Supreme Court reversed. (*Citizens Against Rent Control v. Berkeley, supra,* 454 U.S. 290 [hereafter *CARC*].) The high court reasoned that the pooling of financial resources was essential to effective

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[11] As of 1972, 1 percent of the population held over 20 percent of the nation's personal wealth. (See *Statistical Abstract, supra,* at p. 487, table No. 794.) Some 218,000 individuals possessed estates worth over $10 million each. (*Id.*, at p. 479, table No. 791.) As this court has recognized, such wealth can enable the possessor to exercise a disproportionate influence on the political process. (*Citizens Against Rent Control v. City of Berkeley* (1980) 27 Cal.3d 819, 826-827 [167 Cal.Rptr. 84, 614 P.2d 742], revd. *sub nom. Citizens Against Rent Control v. Berkeley, supra,* 454 U.S. 290 [70 L.Ed.2d 492, 102 S.Ct. 434].)

advocacy because of the rising costs of advertising and direct mail. (*Id.*, at p. 296, fn. 5 [70 L.Ed.2d at p. 499]; accord *Federal Election Commission v. National Conservative Political Action Committee* (1985) __U.S__, __[84 L.Ed.2d 455,__,105 S.Ct. 1459, 1459, 1467-1468].) Further, the court rejected this court's view that the city could restrict the use of concentrated wealth by special interest groups in order to assure others an equal voice in the political process. (*CARC, supra,* 454 U.S. at pp. 295-296 [70 L.Ed.2d at pp. 498-499].)

In *Claiborne Hardware, supra,* 458 U.S. 886, the high court made clear that its concern for effective advocacy was not limited to the expenditure of money, a form of economic power that is possessed primarily by the wealthy. Instead, the court extended the reasoning of *CARC* to cover the collective withholding of patronage, a form of economic influence available to ordinary consumers. (*Id.*, at pp. 907-915 [73 L.Ed.2d at pp. 1232-1238].)

The strike, a combination for the purpose of withholding labor, is no less essential to working people than was the pooling of wealth to the landlords in *CARC* or the collective withholding of purchasing power to the civil rights activists in *Claiborne Haraware.* While working people cannot compete with wealthy individuals or corporations in paying for access to mass communications, they can bring their causes to the public's attention by withholding the one asset that they possess in abundance—the capacity to engage in productive labor.

This court can scarcely deny to working people the protections that are accorded the forms of economic power possessed by other groups. As Justice Traynor once observed, the courts "should not impose ideal standards on one side [of a conflict among groups in society] when they

are powerless to impose similar standards upon the other." (*Hughes v. Superior Court*, *supra*, 32 Cal.2d at p. 868 (dis. opn. of Traynor, J.).)

It remains only to determine whether the common law's flat prohibition on public employee strikes is necessary to serve a compelling state interest. The majority have convincingly refuted the traditional justifications for that ban. (See maj. opn., *ante*, at pp. 573-580.) Although the state has a compelling interest in averting immediate and serious threats to the public health and safety, a flat ban on public employee strikes is by no means the least restrictive method for accomplishing that end. (See *id.*, at p. 580.) Accordingly, today's holding is compelled not only by common law principles but also by the California Constitition.

**GRODIN, J.**, Concurring.—Though I have signed Justice Broussard's plurality opinion, I write separately in response to the concerns expressed in the concurring opinion by Justice Kaus.

I suggest there is little merit in attempting to distinguish, with regard to strikes by employees covered by the Meyers-Milias-Brown Act, between the availability of an injunction at common law and the availability of a damage action. If an injunction is violated, the violation can give rise to a proceeding in contempt for which monetary sanctions may be imposed. The underlying legal question is whether there exists a common law predicate for either remedy. The plurality opinion holds, and I agree that the Meyers-Milias-Brown Act has removed the principal theoretical justification which had been advanced in this state for the proposition that all strikes by local government employees are tortious. Finding no alternative justification sufficiently compelling to require acceptance by the courts in the absence of legislative action, except as regards strikes which

imperil public health or safety, the opinion properly places the ball in the Legislature's court, where it belongs. (*Ante*, p. 591, fn. 39.)

Other states and countries have developed a wide range of policies for dealing with public employee strikes, and the arena is clearly one in which experimentation should be encouraged. Consequently, I share Justice Kaus' concern that we should not attempt to prejudge the constitutionality of any particular legislative response. The plurality opinion explicitly finds it unnecessary to reach the issue in constitutional terms (*ante*, p. 591), and as I understand it discusses the Constitution only in order to demonstrate that were we to adopt the district's position—that there exists an absolute common law ban on public employee strikes in the context of the present statutory scheme—substantial questions of constitutional dimension would arise. (*Ibid.*). It is with that understanding that I join in the opinion.

**LUCAS, J.** —I respectfully dissent. In my view, public employees in this state neither have the right to strike, nor should they have that right. In any event, in light of the difficulty in fashioning proper exceptions to the basic "no strike" rule, and the dangers to public health and safety arising from even a *temporary* cessation of governmental services, the courts should defer to the Legislature, a body far better equipped to create such exceptions.

The majority paints a glowing picture of the public strike weapon as a means of "enhanc[ing] labor-management relations" (*ante*, p. 581), "equalizing the parties' respective bargaining positions," (p. 583), assuring "good faith" collective bargaining (p. 583), and "providing a clear incentive for resolving disputes" (p. 583). Indeed, so enamored is the majority with the concept of the public strike that it elevates this heretofore *illegal* device to a "basic civil liberty." (P. 583.) Though wholly unnecessary to its opinion, the majority in dictum even suggests that public employees may have a *constitutional* right to strike which cannot be legislatively abridged absent some "substantial or compelling justification." (P. 590.)

Thus, in the face of an unbroken string of Court of Appeal cases commencing nearly 35 years ago which hold that public strikes are illegal, we suddenly announce our finding that public strikes are not only lawful in most cases, but indeed they may constitute a panacea for many of the social and economic ills which have long beset the public sector. One may wonder, as I do, why we kept that revelation a secret for all these years. (See *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946, 962 [192 Cal.Rptr. 123, 663 P.2d 893] [conc. opn. by Richardson, J.].)

Despite the majority's encomiums, the fact remains that public strikes may devastate a city within a matter of days, or even hours, depending on the circumstances. For this reason, among many others, the courts of this state (and the vast majority of courts in other states and the federal government) have declared *all* public strikes illegal. As indicated above, until today the California Courts of Appeal uniformly had followed that rule. (See, e.g., *Stationary Engineers v. San Juan Suburban Water Dist.* (1979) 90 Cal.App.3d 796, 801 [153 Cal.Rptr. 666]; *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977) 72 Cal.App.3d 100, 105-107 [140 Cal.Rptr. 41], hg. den.; *Los Angeles Unified School Dist. v. United Teachers* (1972) 24 Cal.App.3d 142, 145-146 [100 Cal.Rptr. 806], hg. den.; *Trustees of Cal. State Colleges v. Local 1352, S.F. State etc. Teachers* (1970) 13 Cal.App.3d 863, 867 [92 Cal.Rptr. 134], hg. den.; *City of San Diego v. American Federation of State etc. Employees* (1970) 8 Cal.App.3d 308, 310 [87 Cap.Rptr. 258], hg. den.; *Almond v. County of Sacramento* (1969) 276 Cal.App.2d 32, 35-36 [80 Cal.Rptr. 518], hg. den.; *Pranger v. Break* (1960) 186 Cal.App.2d 551, 556 [9 Cal.Rptr. 293], hg. den.; *Newmarker v. Regents of Univ. of Cal.* (1958) 160 Cal.App.2d 640, 646 [325 P.2d 558]; *City of L.A. v. Los Angeles etc. Council* (1949) 94 Cal.App.2d 36, 46-47 [210 P.2d 305], hg. den.)

Justice Coughlin's opinion in the *City of San Diego* case offers a cogent analysis of the various rationales underlying the "no strike" rule. He observed that "This California common law rule is the generally accepted common law rule in many jurisdictions. [Citations, including cases from 24 states.]

"The common law rule has been adopted or confirmed statutorily by 20 states and the federal government. [Citations.]

". . . The common law rule [that] public employees do not have the right to bargain collectively or to strike is predicated expressly on the necessity for and lack of statutory authority conferring such right. Where a statute authorizes collective bargaining and strikes it includes them within the methods authorized by law for fixing the terms and conditions of employment. *Those who advocate the right of public employees to strike should present their case to the Legislature.* [Italics added.]

". . . . . .

"Wherever the issue has been raised, it has been held laws governing the rights of public employees to engage in union activities, collective bargaining, strikes and other coercive practices, not equally applicable to private employees, and vice versa, are premised on a constitutionally approved classification; and, for this reason, are not violative of the constitutional guarantee of equal protection of the law. [Citations.] [¶] The reasons for the law denying public employees the right to strike while affording such right to private employees are not premised on differences in types of jobs held by these two classes of employees but upon differences in the employment relationship to which they are parties. The legitimate and compelling state interest accomplished and promoted by the law denying public employees the right to strike is not solely the need for a particular governmental service but the preservation of a system of government in the ambit of public employment and the proscription of practices not compatible with the public employer-employee relationship. [Citation.]" (8 Cal.App.3d at pp. 311-315.)

The decision to allow public employee strikes requires a delicate and complex balancing process best undertaken by the Legislature, which may formulate a comprehensive regulatory scheme designed to avoid the disruption and chaos which invariably follow a cessation or interruption of governmental services. The majority's own proposal, to withhold the strike weapon only where "truly essential" services are involved (p. 580) and a "substantial and imminent threat" is posed (p. 586), will afford little guidance to our trial courts who must, on a "case-by-case" basis (p. 586), decide such issues. Nor will representatives of labor or management be able to predict with any confidence or certainty whether a particular strike is a lawful one or, being lawful at its inception, will become unlawful by reason of its adverse effects upon the public health and safety. In short, the majority's broad holding will prove as unworkable as it is unwise.

Of the few states that permit strikes by public employees, virtually all do so by comprehensive statutory provisions. Some of the statutory schemes begin by creating classifications of employees, distinguishing, for example, workers whose services are deemed essential (e.g., police, firefighters), those whose services may be interrupted for short periods of time (e.g., teachers), and those whose services may be omitted for an extended time (e.g., municipal golf course attendants).[1] These schemes typically define various prerequisites to the exercise of the right to strike for those categories of workers permitted that option.

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[1] See Alaska Statutes section 23.40.200(a) (1972) (categorizing, first, all police, fire, correctional, and hospital workers; second, public utility, snow removal, sanitation, and education employees; and third, all other public workers). See also Minnesota Statutes Annotated section 179A.03 (West Supp. 1985) (defining "essential" workers, etc.).

The prerequisities include a period of mandatory mediation[2] as well as advance notice to the employer.[3] In addition, some statutory schemes lay out the ground rules for binding arbitration.[4]

In contrast, the majority's new California rule is hopelessly undefined and unstructured. In addition to the breadth of the majority's "truly essential" standard, the statutes presently provide no systematic classification of employees according to the nature of their work and the degree to which the public can tolerate work stoppages. Only firefighters are expressly prohibited from striking and giving recognition to picket lines. (Lab. Code, § 1962.) Moreover, the four principal statutory schemes regulating other public employees establish widely differing approaches to labor relations for different types and levels of employees. (Compare Gov. Code §§ 3500-3510 [Meyers-Milias-Brown Act, covering local government employees]; 3512-3524 [State Employer-Employee Relations Act,

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[2] E.g., Alaska Statutes section 23.40.200(c) (1972) (mediation required); Illinois Public Act 83-1012, section 17 (1983) (Ill. Legis. Serv. 6781, to be codified at Ill. Ann. Stat. Ch. 48, § 1617) (mediation required); Minnesota Statutes Annotated section 179A.18, subdivisions 1, 2 (West Supp. 1985) (mediation required for 45 days, 60 days in case of teachers); Pennsylvania Statutes Annotated title 43, section 1101.1003 (Purden Supp. 1984) (mediation required); Wisconsin Statutes Annotated section 111.70(4)(cm) (West Supp. 1983) (mediation-arbitration required).

[3] E.g., Illinois Public Act 83-1012, section 17 (5 days' notice required); Minnesota Statutes Annotated section 179A.18 (West Supp. 1985) (10 days); Wisconsin Statutes Annotated section 111.70(4)(cm) (West Supp. 1983) (10 days).

[4] E.g., Minnesota Statutes Annotated section 179A.16 (West Supp. 1985); Wisconsin Statutes Annotated section 111.70(4)(jm) (West Supp. 1983).

covering state employees]; 3540-3549.3 [Ed. Employment Relations Act, covering public school employees]; 3560-3599 [governing employment in higher education].) Thus, these statutes produce inconsistent results when, as here, the right to strike is given recognition almost across the board.

The Meyers-Milias-Brown Act, for example, provides "no clear mechanism for resolving disputes" between local governments and their workers. (*Ante*, p. 572, fn. 14.) In the absence of an administrative agency to settle charges of unfair labor practices and compel such remedies as mediation, presumably all strike-related issues will go to the courts in the first instance, but the courts are poor forums for the resolution of such issues. On the other hand, issues arising out of work stoppages by public school employees are to be resolved by the Public Employee Relations Board (PERB) on the basis of PERB's own set of remedies. Of course, this anomalous situation is in large part the product of this court's tolerance of strikes by teachers (*El Rancho Unified Sch. Dist. v. National Ed. Assn.*, *supra*, 33 Cal.3d 946; *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1 [154 Cal.Rptr. 893, 593 P.2d 838]) and PERB's correlative expansion of its authority so that it may compel mediation or adopt other remedies in labor disputes in public education (see Cal. Admin. Code, tit. 8, § 32000 et seq.).

Finally, nothing in PERB's explicit statutory powers (Gov. Code, § 3541.3) extends to mandatory arbitration, for example, so it remains to be established whether state employees, also under PERB's jurisdiction (*id.*, § 3513, subd. (g)), will be governed by the same ground rules as educational employees, or whether some of them, perhaps deemed "truly essential," will be subject to binding arbitration under rules that do not now exist.

I would affirm the judgment.

# APPENDIX B

CERTIFIED FOR PUBLICATION

**IN THE COURT OF APPEAL**
**OF THE STATE OF CALIFORNIA**
**SECOND APPELLATE DISTRICT**
**DIVISION TWO**

2 Civil 66088
(Super.Ct. No. C 166219)

**COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY,**
**a public agency,**

*Plaintiff and Respondent,*

*vs.*

**LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION AFL-CIO; VICTOR N. HOCHEE, HARRY GLUCK, JACK ROBERTS, ANTHONY BUTKA EUGENE MILLER, GARY SCHALANDER, BILLY MANNING,**

*Def ndants and Appellants.*

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APPEAL from a judgment of the Superior Court of Los Angeles County. Charles H. Older, Judge. Modified and affirmed.

Geffner & Satzman, by Leo Geffner, for Defendants and Appellants.

Musick, Peeler & Garrett, by Stuart W. Rudnick, Steven D. Weinstein, and Neil O. Andrus, for Plaintiff and Respondent.

George Agnost, City Attorney, and Phillip S. Ward and Steven A. Diaz, Deputy City Attorneys, Amicus Curiae.

Defendants Los Angeles County Employees Association, Local 660, Service Employees International Union, AFL-CIO; Victor N. Hochee; Harry Gluck; and Jack Roberts (Local 660) appeal from the judgment awarding plaintiff County Sanitation District No. 2 of Los Angeles County (District) damages in the sum of $246,904, prejudgment interest in the amount of $87,615.22 and costs of $874.65.

Local 660 contends: "[I.] Whether a public employees strike provides a tort cause of action for damages is an unresolved issue in California. [II.] The trial court committed prejudicial error in granting excessive, unreasonable and unlawful compensatory damages."

The District is a public agency organized pursuant to the provisions of the County Sanitation District Act (Health & Saf. Code, §§ 4700-4789) and is charged with providing, operating and maintaining sewage transport and treatment facilities and landfill refuse disposal sites throughout the County of Los Angeles.[1] It employs some 500 workers who are directly or indirectly responsible for the operation and maintenance of its facilities and who are members of, or represented by, Local 660.

At 10 p.m. on July 5, 1976, approximately 75 percent of these workers went out on strike after negotiations between the District and Local 660 for a new wage and benefit agreement had reached an impasse. The strike continued until July 16, at which time the employees voted to accept

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[1] In 1976 the facilities operated by the District included six sanitary landfills which together received about 15,000 tons of solid waste each day, eleven treatment plants processing 450 million gallons of raw sewage each day, four maintenance yards and 46 pumping stations.

an offer made by the District prior to the strike, i.e., July 1, 1976, and to return to work the following day. In the interim, the District had filed the instant action for injunctive relief and damages on July 6, 1976.

Much has been written on the subject of labor relations in the public sector, including the advisability of granting public employees full collective bargaining rights and, more particularly, the right to strike. (See, e.g., Hanslowe and Acierno, *The Law and theory of Strikes By Government Employees* (1982) 67 Cornell L.Rev. 1055; Comment, *Public Employee Legislation: An Emerging Paradox, Impact, and Opportunity* (1976) 13 San Diego L.Rev. 931; Comment, *California Assembly Advisory Council's Recommendations on Impasse Resolution Procedures and Public Employee Strikes* (1974) 11 San Diego L.Rev. 473; Comment, *The Collective Bargaining Process at the Municipal Level Lingers in Its Chrysalis Stage* (1974) 14 Santa Clara Law. 397; Grodin, *Public Employee Bargaining in California; The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719; Shaw and Clark, *The Practical Differences Between Public and Private Sector Collective Bargaining* (1972) 19 U.C.L.A. L.Rev. 867; Lev, *Strikes by Government Employees: Problems and Solutions* (1971) 57 Amer. Bar Assoc. J. 771; Witt, *The Public Sector Strike: Dilemma of the Seventies* (1971) 8 Cal. Western L.Rev. 102; Bernstein, *Alternatives to the Strike in Public Labor Relations* (1971) 85 Har.L.Re. 459; Burton and Krider, *The Role and Consequences of Strikes by Public Employees* (1970) 79 Yale L.J. 418; Wellington and Winter, *More on Strikes by Public Employees* (1970) 79 Yale L.J. 441; Kheel, *Strikes and Public Employment* (1969) 67 Mich.L.Re. 931; Anderson, *Strikes and Impasse Resolution in Public Employment* (1969) 67 Mich.L.Rev. 943; Wellington and Winter, *The Limits of Collective Bargaining in*

*Public Employment* (1969) 78 Yale L.J. 1107; Thorne, *The Government Employee and Organized Labor* (1962) 2 Santa Clara Law. 147; Note, *Labor Relations in the Public Sector* (1961) 75 Harv.L.Rev. 391; Annot., Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage (1971) 37 A.L.R.3d 1147.)

The California Assembly Advisory Council on Public Employee Relations in its final report of March 15, 1973, concluded that, "[s]ubject only to [certain specified] restrictions and limitations . . . public employees should have the right to strike" (p. 24) and proposed a statute to carry out these goals (Appendix A). Nevertheless, the Legislature "has steadfastly refrained from providing clearcut guidance" in this area. (*El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946, 964 (conc. opn. of Grodin, J.).)

No recent decision of our Supreme Court has squarely passed upon the legality of strikes by public employees, although in *Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen* (1960) 54 Cal.2d 684, wherein the Los Angeles Metropolitan Transit Authority Act was held to authorize strikes by employees of that agency, the court stated: "In the absence of legislative authorization public employees in general do not have the right to strike . . . ." (*Id.*, p. 687.) With complete uniformity the District Courts of Appeal have treated this declaration as establishing a general rule — and have honored it. (See, e.g., *Stationary Engineers v. San Juan Suburban Water Dist.* (1979) 90 Cal.App.3d 796, 801; *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977) 72 Cal.App.3d 100, 105-107, hg. den.; *Los Angeles Unified School Dist. v. United Teachers* (1972) 24 Cal.App.3d 142, 145-146, hg. den.; *Trustees of Cal. State Colleges v. Local*

*1352, S.F. State etc. Teachers* (1970) 13 Cal.App.3d 863, 867, hg. den.; *City of San Diego v. American Federation of State etc. Employees* (1970) 8 Cal.App.3d 308, 310, hg. den.; *Almond v. County of Sacramento* (1969) 276 Cal.App.2d 32, 35-36, hg. den.; *Pranger v. Break* (1960) 186 Cal.App.2d 551, 556, hg. den.; see also, the earlier appellate decision in *Newmarker v. Regents of Univ. of Cal.* (1958) 160 Cal.App.2d 640, 646; *City of L.A. v. Los Angeles etc. Council* (1949) 94 Cal.App.2d 36, 41, hg. den.) Although hearings have been granted in several most recent appellate court decisions, our highest court to date has declined to reach the question of the continuing validity of its earlier pronouncement. (*International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191; *El Rancho Unified School Dist. v. National Education Assn., supra,* 33 Cal.3d 946; *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1; *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898.)

Local 660 argues that prohibiting public employees from striking and subjecting those who engage in such activities to actions for damages is contrary to public policy and inconsistent with "modern society" and that it results in a deprivation of basic constitutional rights. However, it has heretofore been held that the "conduct of an unlawful strike is itself a tort for which damages may be recovered" (*Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers, supra,* 72 Cal.App.3d 100, 112; Annot., Liability of Labor Union or Its Membership for Torts Committed by Officers, Members, Pickets, or Others, in Connection with Lawful Primary Labor Activities (1971) 36 A.L.R.3d 405; and Annot., Damage Liability of State or Local Public Employees' Union or Union Officials for Unlawful Work Stoppage (1978) 84 A.L.R.3d 336), and that the enforcement of the prohibition against such strikes is not

violative of the constitutional rights of free speech and association or the guarantee of equal protection of the law.[2] (*Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers, supra,* 72 Cal.App.3d 100, 104-110; *Los Angeles Unified School Dist. v. United Teachers, supra,* 24 Cal.App.3d 142, 144-146; *City of San Diego v. American Federation of State etc. Employees, supra,* 8 Cal.App.3d 308, 313.)

Insofar as Local 660 asserts the District did not engage in fair bargaining, thereby violating the Meyers-Milias-Brown Act and entitling its employees to "engage in economic action in order to obtain a reasonable settlement," it has been noted that the Meyers-Milias-Brown Act "falls far short of constituting a legislative authorization of a right to strike as a means of settling public employer-employee differences" (*Almond v. County of Sacramento, supra,* 276 Cal.App.2d 32, 38), and, further, the prohibition against public employee strikes has been deemed to apply whether

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[2] Local 660's averments notwithstanding, the strike giving rise to the instant litigation involved more than "peaceful picketing" as was the case in *Lamphere Sch. v. Lamphere Fed. of Teachers* (1977) 400 Mich. 104, 252 N.W.2d 818, 826. (See footnote 4, *post.*)

With respect to Local 660's claim that the "application of equal protection is more apparent since *El Rancho* prohibited the superior court from holding the teachers union liable for damages," we note the court in that case held merely that the Education Employment Relations Act (Gov. Code, § 3540 et seq.) divests a superior court of jurisdiction to entertain a school district's tort suit for damages arising out of a teachers' strike led by noncertified unions, since the Public Employees Relations Board "has exclusive initial jurisdiction to determine whether such a strike is an unfair practice and what, if any, remedies should be pursued." (*El Rancho Unified School Dist. v. National Education Assn., supra,* 33 Cal.3d 946, 961.) It did not specifically declare damages could never be available as a remedy.

an employer "violates the Meyers-Milias-Brown Act or not. [Citations.]" (*Stationary Engineers v. San Juan Suburban Water Dist.* (1979) 90 Cal.App.3d 796, 801.)

While we recognize that often "coming events cast their shadows before" and certain expressions in decisions such as *International Brotherhood of Electrical Workers v. City of Gridley, supra,* 34 Cal.3d 191, 199, fn. 7; *El Rancho Unified School Dist. v. National Education Assn., supra,* 33 Cal.3d 946, 957-958, 962-964; *San Diego Teachers Assn. v. Superior Court, supra,* 24 Cal.3d 1, 6-7, 13; and *City and County of San Francisco v. Cooper, supra,* 13 Cal.3d 898, 912, may have prophetic value, as an intermediate appellate court we remain bound by the presently well-settled rules that deny public employees the right to strike and which subject those who do engage in such unlawful labor practices to tort actions for damages. If these rules should no longer represent the considered view of our Supreme Court, it is the exclusive province of that body to so declare.

On the question of damages the trial court determined that "[i]n order to assure the maintenance of essential public services during the . . . strike, [the District] assigned certain non-striking employees to work extended hours at various of its facilities, and compensated such employees at appropriate rates of overtime pay or compensatory time off for the extra hours served at such facilities during the strike." Specifically, it found the District had "paid overtime compensation in the amount of $301,989; extra FICA payments in the amount of $2,238; and provided compensatory time off having a value of $16,040." The court also ascertained the District reasonably had expended $55,080 "to provide meals, equipment rental, security guard services, and other expenses reasonably related to the

maintenance of its sewage treatment and land fill operations" during the course of the strike.

The court additionally concluded, however, that these strike-related costs, as well as the $6,000 the District had paid in health care benefits for the striking employees during the period of the strike, were subject to an offset in the amount of $134,443, since the District "was not required to compensate [striking] employees . . . ," thereby saving "$112,649 in unpaid salaries; $4,490 in FICA; [ ] $8,312 in retirement [;]" and "$8,992 that would have been paid to the striking employees as overtime if they had remained on the job." As a consequence, the court determined the net monetary damage to the District as a "direct and proximate result" of Local 660's "tortious conduct" to be $246,904.

Local 660's challenge to the accuracy and adequacy of the District's overtime records and the reasonableness of the District's staffing of its various facilities during the duration of the strike is in effect an invitation to us to reweigh the evidence and arrive at a result more favorable to its membership. This we cannot do. "[O]ur reviewing power begins and ends with the determination whether there is any substantial evidence to support the trial court's findings." [Citation.] (*Thompson v. Occidental Life Ins. Co.* (1973) 9 Cal.3d 904, 917.)

Local 660 maintains the District's "records were inherently untrustworthy, as they were based on information given by employees who themselves had a personal interest in exaggerating the amount of overtime." In the absence of any evidence to support such a conclusion, we are unwilling to presume the employees falsely certified the accuracy of the hours set forth on their pay reports. The District's payroll records, introduced as exhibits at trial,

provided ample support of the number of overtime hours worked by employees during the strike.[3]

Substantial evidence also supports the trial court's finding that the District undertook reasonable steps to insure the continued operation of essential sanitary landfill and sewage treatment services to approximately four million residents of the County of Los Angeles by hiring security personnel and assigning a number of nonstriking employees to work extended hours at various facilities.

In support of its allegation that the District's strike-related expenses were excessive, Local 660 presents an extended examination of the security measures and level of staffing which, in its view, would have been appropriate. Even if this analysis might appear to be reasonable, at least in hindsight, that fact alone would not compel the conclusion that the District's plan was unreasonable.

At the time the District's strike contingency plan was implemented, it was not known how extensive the strike activity would be or the form it would take. However, given the critical nature of the services provided by the District, the potential for sabotage and vandalism,[4] and the

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[3] Insofar as there may have been some evidence that a few employees were credited erroneously with having earned strike-related overtime, the trial court was, of course, free to reject it. (*Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc.* (1967) 66 Cal.2d 782, 787.)

[4] In 1974 "substantial numbers" of the District's workers had engaged in a five-day strike during which there apparently was a significant amount of vandalism at the landfills. When faced with the possibility of the instant walkout in 1976, the District developed a strike contingency plan designed to rectify the deficiencies in its previous response.

Notwithstanding such efforts, however, the 1976 strike did not proceed without incident. On July 5, management personnel replacing striking workers at the Joint Water Pollution Control Plant (JWPCP),

replacement workers' lack of experience, and consequent inefficiency in carrying out even the routine duties of the striking employees, the District would have been remiss had it simply replaced those workers on strike and maintained a "regular" work schedule. On the other hand, of course, if the District had capitalized on the crisis, as Local 660 suggests, to "help [ ] itself . . . on the expectation that [the] Union could pay for this 'windfall', " it would not be entitled to full compensation for the expenses incurred. We are conviced by the record before us that the District undertook only those precautions which in its best judgment were legitimately required to guarantee the security and continued operation of its facilities. It would ill behoove us

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the District's largest sewage treatment facility, discovered a plywood disk concealed in a sludge line. In addition, a locked plant vehicle, from which the keys had been removed, was found blocking the entrance to the maintenance building and a mechanized gate was damaged and rendered inoperable, thereby breaching plant security. Entrances to the work site were routinely strewn with roofing tacks and broken glass.

On the afternoon of July 6 it was discovered that on the three days preceding the strike, "[o]perations personnel [had] increased sludge pumping to abnormally high rates from the primary sedimentation tanks to the anaerobic digesters. This act reduced biological activity in the digesters and substantially reduced the production of methane gas. Since most of the plant facilities rely on methane gas for power production, emergency measures were required to be taken to conserve gas for the most critical operations." JWPCP is designed such that any significant delay in starting the effluent pumps could cause the plant to "flood out." Although the plant contained an emergency standby generator, its battery cables had been cut.

On July 6 and July 16 debris of a type and magnitude that "does not normally enter the sewer system," e.g., an inner-spring mattress, tires, a canvas tarpaulin, upholstered cushions, carpeting and cabinet doors were removed from the bar screens at JWPCP. On the latter date the chains that drive the bar screens were broken as a result of the debris.

to "second guess" these decisions at this late date, even if it were otherwise permissible to do so.

With respect to those employees who were required to be on duty 24 hours per day with no guarantee of uninterrupted sleep or meals, it was entirely fitting that they be fully compensated therefor, even though a portion of their time was in fact devoted to eating, sleeping or "leisure" activities, such as reading or card-playing. (*Armour & Co. v. Wantock* (1944) 323 U.S. 126; *Skidmore v. Swift & Co.* (1944) 323 U.S. 134; *General Electric Co. v. Porter* (1953) 208 F.2d 805; 29 C.F.R. 785, et seq.) Similarly, such employees were entitled to meals at the employer's expense.

Local 660 urges error in the trial court's assessment of damages on the basis of compensatory time off granted to several District employees, asserting that in the absence of any evidence replacements were hired for such employees, there could be no labor cost associated with this benefit. We disagree. When an employee receives compensatory time off, whether for vacation, sick leave, or as here, in lieu of monetary payment for overtime, the employer is, in effect, paying for services it does not receive. While the remaining employees may "take up the slack," at least to the extent the size of the labor force originally was inflated to accommodate a certain number of nonproducing employees, such a system clearly is not without cost to the employer.[5] Though it may be difficult to determine in any given case whether that cost is actually equivalent to the nonproducing employee's earnings, as a general rule such a measure appears to be a fair one.

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[5] The fact that the District's employees at the time of trial might not have utilized their time off does not alter this conclusion.

Local 660 further contends the trial court improperly utilized a time and one-half formula to calculate the damages incurred by the District for overtime compensation to managerial personnel working during the strike. We agree.

The Salary Resolution in effect at the time of the strike[6] provides a three-tiered formula, tied to monthly salary, for payment of overtime to managerial personnel. While the resolution does specify those employees whose basic monthly salaries are at the lowest levels are entitled to time and one-half, those receiving mid-range salaries are to be compensated at specified hourly rates, and those at the upper salary ranges are to receive straight time rates of compensation.

The District has not shown the existence of any other provision, whether by ordinance, resolution or memo of understanding, which permits the payment of time and one-half to *all* managerial personnel under *any* circumstances. Nevertheless, it urges that the Salary Resolution "is addressed [only] to the District's normal, day-to-day operation" and "was never intended to apply to an extraordinary or emergency situation, such as the strikes in 1974 and 1976, and did not, therefore, render inappropriate the overtime policy during the strike."

It is well settled that a "public employee is entitled only to such compensation as is expressly provided by statute or ordinance regardless of the extent of services actually rendered. [Citations.]" (*Markman v. County of Los Angeles*

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[6] The Resolution, which sets the level of wages, hours, salaries, fringe benefits, and other terms and conditions of employment, was approved and adopted by a vote of the District's Board of Directors, functioning as the governing body of the District. (Health & Saf. Code, § 4730.)

(1973) 35 Cal.App.3d 132, 135.) "In the absence of a provision which provides for such payment, no such payment is authorized." (*Van Riessen v. City of Santa Monica* (1976) 63 Cal.App.3d 193, 199; *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 22-23.)[7]

The District also argues that notwithstanding the Salary Resolution, its mangerial employees were entitled to overtime compensation at one and one-half times their regular rate of pay under the Fair Labor Standards Act of 1938. (29 U.S.C. § 201 et seq.)

The Fair Labor Standards Act (FLSA), enacted by Congress forty-five years ago, requires employers covered thereby to pay their employees a minimum hourly wage (29 U.S.C. § 206(a)) and to pay them at one and one-half times their regular rate of pay for hours worked in excess of 40 per week (29 U.S.C. § 207(a)).[8] Expressly exempted from the provisions of sections 206 and 207 are those employees "employed in a bona fide executive, administrative, or

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[7] So far as the record reveals, overtime compensation at the rate of time and one-half was paid upon the verbal instructions of the District's Chief Engineer. Nothing contained within the April 1, 1976, amended joint administration agreement entered into by the twenty-seven sanitation districts of Los Angeles County supports a finding that the power to authorize employee compensation at variance with that contained in the Salary Resolution was delegated to this individual. Neither does section 6522 of the Health and Safety Code, which permits the District to "do any act necessary or proper to the complete exercise and effect of any of its powers, or for the purposes for which it is formed," justify the action of the Chief Engineer.

[8] The original Act specifically excluded the states and their political subdivisions from its coverage. In 1974, however, Congress enacted a series of broadening amendments which extended the minimum wage provisions to almost all public employees. (29 U.S.C. §§ 203(d); 203(e)(2)(C); 203(x).)

professional capacity" (29 U.S.C. § 213(a)), hereinafter referred to collectively as "managerial" personnel.[9]

Whether an employee is a managerial employee may be determined in one of two ways under FSLA regulations promulgated by the Secretary of Labor. (29 C.R.R. §§ 541.1; 541.2; 541.3.) These regulations establish different legal tests according to salary level, with employees earning less than $250 per week being subject to the so-called "long test," while those earning $250 or more are governed by the "short test." (*Donovan v. Burger King Corp.* (1982) 675 F.2d 516, 518.)

At issue here is whether the District's high-salaried employees lost their exempt status from the Act's overtime pay provisions when they deviated from their normal duties and performed nonexempt work during the strike.[10]

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[9] The District's Salary Resolution contains the following provisions relating to nonexempt and exempt employees:

> "5.1A 'Non Exempt employees' means employees who would be subject to the provisions of the Federal Fair Labor Standards Act, if the Act were applicable to [the] Districts' employees. Non exempt employees who are ordered by the Districts to work overtime, as defined in the Federal Fair Labor Standards Act, will be paid at the rate specified in the Act for such ordered overtime . . . ."
>
> "5.1B 'Exempt employees' means employees who would not be subject to the provisions of the Federal Fair Labor Standards Act, if the Act were applicable to [the] Districts' employees

[10] "There is no difficulty in determining when exempt status is lost through the performance of nonexempt work by a managerial employee under the long tests. If a long test managerial employee spends more than 20 percent of his time in a given workweek performing nonexempt work, the managerial exemption is lost. See 29 C.F.R. §§ 541.1(e); 541.2(d); 541.3(d)." (*Marshall v. Western Union Tel. Co.* (1980) 621 F.2d 1246, 1250.) However, this is of no moment in the instant case,

Under the short test, managerial status is determined by reference to the employee's "primary duty" as an employee. (29 C.F.R. §§ 541.1(f); 541.2(e); 541.3(e).) Although the regulations do furnish some guidance on what is meant by primary duty (29 C.F.R. §§ 541.103; 541.206; 541.304), they provide no basis for measuring such duty in any specific time frame. Nevertheless, we are persuaded by the discussion of the United States Court of Appeals for the Third Circuit in *Marshall v. Western Union Tel. Co., supra,* 621 F.2d 1246, that there is no rationale in the underlying theory or policy of FLSA which would warrant paying high-salaried managerial personnel overtime at one and one-half times their base salary for time worked in excess of forty hours, even if during any workweek they spent the major portion of their time on nonexempt work:[11]

> "Although a workweek standard is indeed a fundamental part of FLSA, the exemption of managerial employees from the general coverage of the Act confirms our view that they were not

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since any District managerial employees who earned less than $250 per week were entitled to time and one-half under the Salary Resolution itself.

[11] The first time the *Western Union* case was before the Third Circuit it held "no more than that managerial personnel who perform strike duty are not necessarily exempt" and directed the district court to decide "if, under the regulations, the determination of whether an employee is 'employed in a bona fide executive . . . capacity' is to be made with respect to each week separately or with respect to a broader period of time." (*Brennan v. Western U. Tel. Co.* (1977) 561 F.2d 477, 483.)

Upon remand, the district court adopted a standard "by which the exempt status of managerial employees would be determined through an evaluation *each week* of the 'primary duty' of the employee." (*Marshall v. Western Union Tel. Co., supra,* 621 F.2d 1246, 1248; emphasis added.) The *Marshall* court reversed.

within the scope of Congress' concerns in enacting this legislation. The reason is plain: the underlying and declared purpose of FLSA is to eradicate from interstate commerce conditions detrimental to 'the maintenance of a minimum standard of living necessary for health, efficiency, and general well-being of workers.' 29 U.S.C. § 202(a) (1976). Thus, FLSA bans from interstate commerce products produced through the imposition of lengthy hours of work at low wages. [Citation.]

"Specifically, the Act was manifestly designed to place a floor under wages and a ceiling over hours of employment. The limitation in hours also served the purpose during a time of extraordinary unemployment and depressed wages of spreading the work and providing extra compensation for overtime. [Citation.] Setting a floor under wages and a ceiling over normal hours of employment had the further purpose of eliminating from commerce the evils attendant upon low wages and long hours of service. [Citations.] Thus, the forty-hour provision of the Act is an essential element in spreading the work among the rank and file and compensating an employee in a specific manner for the strain of working longer than forty hours. [Citation.] There is nothing in the Act that demonstrates Congress had these concerns in mind for managerial employees and that it, therefore, intended that the workweek standard also be applied to them in measuring their exempt status.

> "Managerial employees, particularly executives, generally direct and operate a business enterprise. Because they have the power to direct, supervise, and manage the operations and are paid accordingly, granting managerial employees exempt status must have been a recognition that they are seldom the victims of substandard working conditions and low wages. Congress apparently acted on this basic principle of industrial organization, realizing that compensation and working conditions of managerial employees normally would be significantly above those of the hourly wage earner. Therefore, there was no need for Congress to be concerned about the number of hours worked per week or the hourly wage for them . . . ." (*Marshall v. Western Union Tel. Co., supra,* 621 F.2d 1246, 1250-1251.)[12]

We, therefore, hold that the District's managerial employees retained their exempt status during the strike and, consequently, the trial court erred when it failed to apply the terms of the Salary Resolution to determine the amount of compensation to which these employees were entitled for working overtime during the strike.[13] According to evidence introduced at trial, which the parties do not appear to dispute, utilization of the Resolution would have

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[12] Moreover, such a standard would be most impractical to implement. (*Marshall v. Western Union Tel. Co., supra,* at pp. 1251-1252.)

[13] Ironically, in the absence of this Resolution if the rights of the exempt employees here were to be determined solely under federal statutory law, they would be entitled to no overtime compensation whatsoever.

resulted in total damages to the District of $298,257, broken down as follows: overtime costs, including those attributable to compensatory time off, of $241,174; FICA contributions of $2,003; and out of pocket damages, which remain unchanged by the present valuation, of $55,080. From this total must be deducted offsets in the sum of $134,443,[14] reducing the District's net damages and Local 660's liability to $163,814.

Finally Local 660 contends that the court erred in granting prejudgment interest. In opposition the District maintains "[t]he trial court properly awarded prejudgment interest both as a matter of sound discretion [pursuant to Civil Code section 3288] and as a matter of law [pursuant to subdivision (a) of Civil Code section 3277]."

In the absence of any indication that the interest award represented an exercise of the court's discretion under section 3288,[15] we assume it was made pursuant to

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[14] As we mentioned previously, the trial court reduced the District's damages by $134,443 to account for withheld salaries ($112,649); FICA contributions ($4,490); retirement contributions ($8,312); and overtime ($8,992) of striking workers.

We have not diminished these offsets by the $6,000 the District claimed it had paid toward striking employees' health insurance during the period of the strike. The evidence at trial uncontrovertibly demonstrated the District was not billed on a prorated basis for such benefits, but on the contrary, was required to contribute its full share of the employee's monthly premium, if the employee worked but a single day during any given month.

[15] We reject the District's contention that the court "acting under its equitable 'clean up' powers had discretion to award prejudgment interest." A similar claim was made with regard to the special damages award and is likewise unpersuasive. Moreover, to the degree the court based the awards upon this ground, it erred.

Where as here, "legal and equitable remedies are sought in the same

subdivision (a) of section 3287, which establishes the right of a plaintiff to recover prejudgment interest whenever the amount of damages is liquidated, i.e., "certain, or capable of being made certain by calculation, . . ."

The certainty requirement was present in the instant case for once the District's entitlement to recovery of overtime-related expenses was established, the calculation thereof was readily accomplished by resort to simple mathematics. (See generally *Leff v. Gunter* (1983) 33 Cal.3d 508, 519-520; *Tripp v. Swoap* (1976) 17 Cal.3d 671, 681-682.) The fact that unliquidated setoffs may have existed does not preclude allowance of prejudgment interest. (*Leaf v. Phil Rauch, Inc.* (1975) 47 Cal.App.3d 371, 376.) The same can be said with respect to claims for costs clearly incurred after the strike. Such errors are minor and easily correctable. (See *Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396, 408-409; *Charlton v. Pan American World Airways* (1953) 116 Cal.App.2d 550, 554-555.)

The judgment is modified to reduce damages from $246,904 to $163,814 and, as so modified, is affirmed.

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action, each remedy is governed by the law that would apply to it if the other remedy had not been requested." (*Crouser v. Boise* (1942) 51 Cal.App.2d 198, 200.) The material at 38 Cal.Jur.3d, Injunctions § 91, cited by the District sets forth the well known, but here irrelevant, principle that a court of equity having once acquired jurisdiction of the subject matter of an action is justified in retaining it until all issues in the action have been determined. (*Union Oil Co. v. Reconstruction Oil Co.* (1937) 20 Cal.App.2d 170, 183.) Even in such cases, however, the legal issues are resolved by application of legal principles. (*Id.*, p. 184.)

CERTIFIED FOR PUBLICATION

_____, J.
GATES

We concur:

_____, J.
ROTH

_____, J.
COMPTON

CERTIFIED FOR PUBLICATION

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO**

2 Civil 66088
(Super.Ct.No. C 166219)

**COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY,**
**a public agency,**

*Plaintiff and Respondent,*

*v.*

**LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION AFL-CIO; VICTOR N. HOCHEE, HARRY GLUCK, JACK ROBERTS, ANTHONY BUTKA, EUGENE MILLER, GARY SCHALANDER, BILLY MANNING,**

*Defendants and Appellants.*

## MODIFICATION OF OPINION

The above entitled opinion filed on October 12, 1983, is hereby modified as follows:

1. The sentence in the body of the opinion beginning on page 23 and continuing to page 24 which reads:

> From this total must be deducted offsets in the sum of $134,443,[14] reducing the district's net damages and Local 660's liability to $163,814.

is stricken and replaced with the following:

> After deducting from this total the offsets allowed by the trial court in the sum of $134,443,[14] the District's net damages and Local 660's liability is $163,814.

2. The following is added as a further paragraph to present footnote 14 on page 24:

> The trial court's election to offset salary savings as part of its damages formula not having been challenged on this appeal, we express no opinion concerning the necessity therefor.

# APPENDIX C

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

CASE NO. 166 219

COUNTY SANITATION DISTRICT NO. 2
OF LOS ANGELES COUNTY,
a public agency,

*Plaintiff,*

*vs.*

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; VICTOR N. HOCHEE, HARRY GLUCK, JACK ROBERTS, ANTHONY BUTKA, EUGENE MILLER, GARY SCHALANDER, BILLY MANNING, AND DOES 1 through 800,

*Defendants.*

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# FINDINGS OF FACT AND CONCLUSIONS OF LAW

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This matter came on regularly for trial on March 17, 18, 23, 24, 25, 26, 27, 30 and 31, 1981, and on April 1, 2, and 6, 1981, in Department 69 of the above-entitled Court, the Honorable Charles H. Older, Judge presiding. Musick, Peeler & Garrett; Larry A. Curtis, Stuart W. Rudnick, and Steven D. Weinstein appeared as attorneys for Plaintiff, and Geffner and Satzman, and Leo Geffner appeared as attorneys for Defendants.

During the course of the trial, the Court received oral and documentary evidence on behalf of all parties, and all parties filed post-trial briefs, which were fully considered by the Court. On April 27, 1981, the Court issued and served on the parties a Minute Order containing its Intended Decision for the Plaintiff and against certain of the Defendants. Defendants have submitted a timely request for Findings of Fact and Conclusions of Law, and pursuant to Rule 232, California Rules of Court, the Court now makes the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

1. Defendant Los Angeles County Employees Association, Local 660, Service Employees International Union, AFL-CIO (hereinafter referred to as "Local 660" or the "Union"), is and has at all times material hereto been a California non-profit corporation and an employee organization having as one of its primary purposes the representation of Plaintiff's blue collar employees in their employment relations with Plaintiff.

2. At all times material to these proceedings, Defendant Victor N. Hochee was the General Manager of the Defendant Union. He reported directly to the Union's board of directors, and had the overall duty and right to control, direct, and manage all activities of the Defendant Union, including collective bargaining and strike activities. He did in fact exercise such managerial authority during the months of June and July, 1976; and he personally undertook actions that precipitated and maintained a strike by Plaintiff's blue collar employees between July 5, 1976, and July 18, 1976.

3. At all times material to these proceedings, Defendant Harry Gluck was an employee of the Defendant Union, and was in charge of all collective bargaining activities for the Defendant Union. He was the manager and supervisor of all of the Defendant Union's employed business agents during the months of June and July, 1976; and he personally exercised his managerial and supervisory authority to direct, manage, control and assign such business agents and others to undertake actions that caused and maintained a strike by Plaintiff's blue collar employees between July 5, 1976 and July 18, 1976.

4. At all times material to these proceedings, Defendant Anthony Butka was the Director of Research for the Defendant Union and Defendants Eugene Miller, Gary Schalander, Billy Manning, and Jack Roberts were employed by the Defendant Union as business agents. Each of them had been assigned by the Defendants Hochee and Gluck to activities having the intended effect of precipitating and maintaining a strike by Plaintiff's blue collar employees and during the months of June and July, 1976, Defendant Jack Roberts undertook actions that did precipitate a strike by Plaintiff's blue collar employees on July 5, 1976, and which actions further served to maintain and prolong such strike between July 5, 1976 and July 18, 1976.

5. Plaintiff County Sanitation District No. 2 of Los Angeles County is a public agency charged with the construction, maintenance and operation of sanitary land fill and sewage treatment facilities within the County of Los Angeles, pursuant to provisions of the California Health and Safety Code. Plaintiff also is signatory to a joint powers agreement with 26 other sanitation districts within the County of Los Angeles, which agreement vests Plaintiff

with the authority to employ all employees of the several districts, and to act on behalf of itself and the 26 other districts in personnel and labor relations matters, and in the maintenance of the present action.

6. In June and July, 1976, the Defendant Union and the Defendants Hochee, Gluck and Roberts, took actions which they knew or should have known would cause blue collar employees of Plaintiff to engage in a concerted work stoppage on and after July 5, 1976, and such actions did in fact proximately cause such a work stoppage.

7. The aforementioned work stoppage had the intended purpose of disabling Plaintiff from providing sanitary land fill and sewage treatment services for the benefit of approximately 4,000,000 citizens of the County of Los Angeles.

8. On July 6, 1976, a temporary restraining order was issued to enjoin each of the above-mentioned Defendants from the continuation of activities having the effect of causing and maintaining the aforementioned strike. Such Defendants were served with the temporary restraining order or otherwise had knowledge of its contents on or about July 6, 1976, and nevertheless willfully disobeyed such order between July 6, 1976 and July 18, 1976. Accordingly, equitable relief did not fully serve to provide a remedy for the harm suffered by Plaintiff as a result of the aforementioned actions of Defendants. In October, 1976, Defendant Union was adjudged guilty of three counts of contempt, and paid a fine of $1,500, as a result of violation of the aforementioned temporary restraining order. The payment of such fine did not in any manner serve to make Plaintiff whole for the harm suffered as a result of the aforementioned actions of Defendants.

9. At all times during the labor negotiations that preceded the July 5, 1976 strike, the Plaintiff and its authorized representatives met and conferred in good faith, and met promptly, upon request, for a reasonable number of times, and exchanged proposals and concessions in a good faith attempt to arrive at the terms of a negotiated Memorandum of Understanding, both prior to and after the July 5, 1976, inception of the aforementioned strike activities.

10. At the inception of the strike, and as more fully set forth below, Plaintiff undertook certain measures to enable it to continue providing essential sanitary land fill and sewage treatment services to approximately 4,000,000 residents of the County of Los Angeles. Each of the measures more fully set forth below was reasonable in the light of the strike situation that confronted the District between July 5, 1976 and July 18, 1976.

11. In order to assure the maintenance of essential public services during the aforementioned strike, Plaintiff assigned certain non-striking employees to work extended hours at various of its facilities, and compensated such employees at appropriate rates of overtime pay or compensatory time off for the extra hours served at such facilities during the strike. In this regard, the Plaintiff properly paid overtime compensation in the amount of $301,989; extra FICA payments in the amount of $2,238; and provided compensatory time off having a value of $16,040. Such amounts total $320,267, and, before the offsets more fully set forth below, represent an amount that Plaintiff was damaged as a direct and proximate result of the strike activities of Defendants as set forth above.

12. During the course of the strike, Plaintiff reasonably expended the amount of $55,080 to provide meals,

equipment rental, security guard services, and other expenses reasonably related to the maintenance of its sewage treatment and land fill operations. Such amounts would not have been expended but for the strike activities of Defendants as set forth above, and accordingly, Plaintiff was damaged in the amount of $55,080 as a direct and proximate result of such activities of Defendants.

13. Because it was not required to compensate employees who were on strike during the period July 5, 1976 until July 18, 1976, the Plaintiff saved $112,649 in unpaid salaries; $4,490 in FICA; and $8,312 in retirement. In addtion, the Plaintiff saved $8,992 that would have been paid to the striking employees as overtime if they had remained on the job. However, Plaintiff also voluntarily continued to pay health care benefits for the striking employees, at a cost of $6,000 during the course of the strike. Accordingly, Plaintiff's net savings as a result of the strike activities were $128,443.

14. The net monetary damage to Plaintiff as a direct and proximate result of the strike activities of Defendants as set forth above is $246,904.

15. On and after July 18, 1976, Plaintiff has lost the use of the sum of $246,904, and accordingly is entitled to prejudgment interest at the legal rate to compensate for the loss of such amount.

16. The Court judicially notices the pleadings and orders in *County Sanitation Districts No. 2 of Los Angeles County vs. Los Angeles County Employees Association, Local 660, SEIU, et al.*, Superior Court of the State of California for the County of Los Angeles, Case No. C 92480, June 26, 1974.

17. Each and every Conclusion of Law which may be properly a Finding of Fact is incorporated herein by reference as though fully set forth hereafter.

## CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the court makes the following Conclusions of Law:

1. The actions of the Defendant Union and Defendants Victor N. Hochee, Harry Gluck, and Jack Roberts in encouraging strike activities and the withholding of services by Plaintiff's employees; and in taking actions having the intent and the effect of precipitating such strike activities; and in taking actions for the purpose of maintaining such strike activities after their inception, were unlawful and were contrary to the public policy of the State of California.

2. The Defendants' unlawful activities in violation of the declared public policy of the State of California were the direct and proximate cause of the actions that Plaintiff was required to undertake to maintain essential public services, and Plaintiff's net additional cost of $246,904 constitutes the special damages suffered by Plaintiff as a direct and proximate result of the aforementioned tortious conduct of Defendants and each of them.

3. The issuance of temporary restraining order prohibiting Defendants' unlawful activities on and after July 6, 1976 did not serve to fully remedy or terminate the harm to Plaintiff, because of the Defendants' willful disobedience of such restraining order. Accordingly, the award of special damages in the net amount of $246,904 is necessary and appropriate under this Court's equitable jurisdiction to provide a remedy for the wrongs suffered by Plaintiff as a direct result of Defendants' willful and continued

disobedience of the aforementioned temporary restraining order.

4. The measures adopted by Plaintiff to continue the provision of essential public services during the aforementioned strike were at all times reasonable in light of the damages that would have been incurred by Plaintiff and by citizens of the County of Los Angeles served by Plaintiff if such actions had not been taken to avoid or minimize the loss threatened by Defendants' unlawful activities.

5. Defendants Victor N. Hochee, Harry Gluck, and Jack Roberts individually and collectively undertook actions on behalf of the Defendant Union that caused, precipitated, and maintained unlawful strike activities by Plaintiff's blue collar employees, and said Defendants are liable for their intentional misconduct.

6. At all relevant times, Plaintiff and its representatives met and conferred in good faith with Defendant Union and its representatives, and at no time was Plaintiff guilty of unclean hands.

7. At no relevant time have the employees of Plaintiff possessed any legal right to engage in a strike or in any other form of concerted activity involving a withholding, cessation, or slowing of the services for which such employees were retained.

8. Plaintiff is entitled to recover prejudgment interest at the legal rate on its special damages from and after the date of termination of the strike, on July 18, 1976.

9. Each and every Finding of Fact which may be properly a Conclusion of Law herein is incorporated by reference as though set forth in full hereat.

10. Let judgment be entered accordingly, with costs of suit to be awarded to Plaintiff.

DATE: 8/13/81

CHARLES H. OLDER
Judge of the Superior Court

**SUPERIOR COURT**
**OF THE STATE OF CALIFORNIA**
**FOR THE COUNTY OF LOS ANGELES**

CASE NO. 166 219

**COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, a public agency,**

*Plaintiff,*

*vs.*

**LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; VICTOR N. HOCHEE, HARRY GLUCK, JACK ROBERTS, ANTHONY BUTKA, EUGENE MILLER, GARY SCHALANDER, BILLY MANNING, AND DOES 1 through 800,**

*Defendants.*

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## JUDGMENT

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This matter came on regularly for trial on March 17, 18, 23, 24, 25, 26, 27, 30 and 31, 1981, and on April 1, 2, and 6, 1981, in Department 69 of the above-entitled Court, the Honorable Charles H. Older, Judge presiding. Musick, Peeler & Garrett, Larry A. Curtis, Stuart W. Rudnick, and Steven D. Weinstein appeared as attorneys for Plaintiff, and Geffner and Satzman, and Leo Geffner appeared as attorneys for Defendants. Evidence, both oral and documentary, having been presented by all parties, the cause having been argued and submitted for decision, and

the Court, on request of Defendants, having caused to be made and filed herein its written Findings of Fact and Conclusions of Law now makes the following judgment:

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff recover from Defendants Los Angeles County Employees Association, Local 660, Service Employees International Union, AFL-CIO; Victor N. Hochee; Harry Gluck; and Jack Roberts damages in the sum of $246,904, plus interest thereon at the rate of 7% per annum from July 18, 1976, together with Plaintiff's costs of suit to date in the sum of $87,615.22 as may be determined subsequent to entry of this Judgment, in the sum of $_____.

DATE: 8/31/81

CHARLES H. OLDER
Judge of the Superior Court

Judgment entered on _____, 19__ in the Judgment Book, Volume No. _____, Page _____.

_____ Clerk

By _____ Deputy

# APPENDIX D

## § 1251. Congressional declaration of goals and policy

(a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter —

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in the development, revision, and enforcement of any regulation, standard, effluent

limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce, and eliminate pollution in concert with programs for managing water resources.

**§ 1319. Enforcement**

**State enforcement; compliance orders**

(a) (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit

program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person —

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition

or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5) (A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the

form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

**Civil actions**

(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or

temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

**Criminal penalties**

(c) (1) Any person who willfully or negligently violates section 1311, 1312, 1316, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State or in a permit issued under section 1344 of this title by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by

imprisonment for not more than six months, or by both.

(3) For the purposes of this subsection, the term "person" shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

**Civil penalties**

(d) Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

**State liability for judgments and expenses**

(e) Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

**Wrongful introduction of pollutants into treatment works**

(f) Whenever, on the basis of any information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 1317 of this title, the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this chapter. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this chapter.

June 30, 1948, c. 758, Title III, § 309, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 859, and amended Dec. 27, 1977, Pub.L. 95-217, §§ 54(b), 55,56,67(c)(2), 92 Stat. 1591, 1592, 1606.

**§ 1321. Oil and hazardous substance liability**

**(a) Definitions**

For the purpose of this section, the term —

(1) "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil;

(2) "discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping, but excludes (A) discharges in compliance with a permit under section 1342 of this title, (B) discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 1342 of this title, and subject to a condition in such permit, and (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 1342 of this title, which are caused by events occurring within the scope of relevant operating or treatment systems;

(3) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel;

(4) "public vessel" means a vessel owned or bareboat-chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce;

(5) "United States" means the States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands;

(6) "owner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

(7) "person" includes an individual, firm, corporation, association, and a partnership;

(8) "remove" or "removal" refers to removal of the oil or hazardous substances from the water and shorelines or the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;

(9) "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention on the Territorial Sea and the Contiguous Zone;

(10) "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land;

(11) "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel;

(12) "act of God" means an act occasioned by an unanticipated grave natural disaster;

(13) "barrel" means 42 United States gallons at 60 degrees Fahrenheit;

(14) "hazardous substance" means any substance designated pursuant to subsection (b)(2) of this section;

(15) "inland oil barge" means a non-self-propelled vessel carrying oil in bulk as cargo and certificated to operate only in the inland waters of the United States, while operating in such waters;

(16) "inland waters of the United States" means those waters of the United States lying inside the baseline from which the territorial sea is measured and those waters outside such baseline which are a part of the Gulf Intracoastal Waterway.

(17) "Otherwise subject to the jurisdiction of the United States" means subject to the jurisdiction of the United States by virtue of United States citizenship, United States vessel documentation or numbering, or as provided for by international agreement to which the United States is a party.

**(b) Congressional declaration of policy against discharges of oil or hazardous substances; study of higher standard of care incentives and report to Congress; liability; penalties; civil actions: penalty limitations, separate offenses, jurisdiction, mitigation of damages and costs, recovery of removal costs and alternative remedies**

(1) The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnasan Fishery Conservation and Management Act).

(2) (A) The Administrator shall develop, promulgate, and revise as may be appropriate, regulations designating as hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnasan Fishery Conservation and Management Act), present an imminent and substantial danger to the public health or welfare, including,

but not limited to, fish, shellfish, wildlife, shorelines, and beaches.

(B) The Administrator shall within 18 months after the date of enactment of this paragraph, conduct a study and report to the Congress on methods, mechanisms, and procedures to create incentives to achieve a higher standard of care in all aspects of the management and movement of hazardous substances on the part of owners, operators, or persons in charge of onshore facilities, offshore facilities, or vessels. The Administrator shall include in such study (1) limits of liability, (2) liability for third party damages, (3) penalties and fees, (4) spill prevention plans, (5) current practices in the insurance and banking industries, and (6) whether the penalty enacted in subclause (bb) of clause (iii) of subparagraph (B) of subsection (b)(2) of section 311 of Public Law 92-500 should be enacted.

(3) The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnason Fishery Conservation and Management Act), in harmful quantities as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges of oil into the waters of the contiguous zone or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), where permitted under the International

Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

(4) The President shall by regulation determine for the purposes of this section, those quantities of oil and any hazardous substance the discharge of which may be harmful to the public health or welfare of the United States, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

(5) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person (A) in charge of a vessel from which oil or a hazardous substance is discharge in violation of paragraph (3)(i) of this subsection, or (B) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of this subsection and who is otherwise subject to the jurisdiction of the United States, or (C) in charge of an onshore facility or an offshore facility, who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person

in any criminal case, except a prosecution for perjury or for giving a false statement.

(6)(A) Any owner, operator, or person in charge of any onshore facility or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. Any owner, operator, or person in charge of any vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this subsection, and any owner, operator, or person in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) who is otherwise subject to the jurisdiction of the United States, shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary. The Secretary of the Treasury shall withhold at the request of such Secretary the clearance required by section 91 of Title 46 of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to such Secretary.

(B) The Administrator, taking into account the gravity of the offense, and the standard of care manifested by the owner, operator, or person in charge, may commence a civil action against any such person subject to the penalty under subparagraph (A) of this paragraph to impose a penalty based on consideration of the size of the business of the owner or operator, the effect on the ability of the owner or operator to continue in business, the gravity of the violation, and the nature, extent, and degree of success of any efforts made by the owner, operator, or person in charge to minimize or mitigate the effects of such discharge. The amount of such penalty shall not exceed $50,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, operator, or person in charge, such penalty shall not exceed $250,000. Each violation is a separate offense. Any action under this subparagraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to assess such penalty. No action may be commenced under this clause where a penalty has been assessed under clause (A) of this paragraph.

(C) In addition to establishing a penalty for the discharge of a hazardous substance, the Administrator may act to mitigate the damage to the public health or welfare caused by such discharge. The cost of such mitigation shall be deemed a cost incurred under subsection (c) of this section for the removal of such substance by the United States Government.

(D) Any costs of removal incurred in connection with a discharge excluded by subsection (a)(2)(C) of this section shall be recoverable from the owner or operator of the

source of the discharge in an action brought under section 1319(b) of this title.

(E) Civil penalties shall not be assessed under both this section and section 1319 of this title for the same discharge.

**(c) Removal of discharged oil or hazardous substances; National Contingency Plan**

(1) Whenever any oil or a hazardous substance is discharged, or there is a substantial threat of such discharge, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnasan Fishery Conservation and Management Act) the President is authorized to act to remove or arrange for the removal of such oil or substance at any time, unless he determines such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs.

(2) Within sixty days after October 18, 1972, the President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances, pursuant to this subsection. Such National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances, and shall include, but not be limited to —

(A) assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies, including, but not limited to, water pollution control, conservation, and port authorities;

(B) identification, procurement, maintenance, and storage of equipment and supplies;

(C) establishment or designation of a strike force consisting of personnel who shall be trained, prepared, and available to provide necessary services to carry out the Plan, including the establishment at major ports, to be determined by the President, of emergency task forces of trained personnel, adequate oil and hazardous substance pollution control equipment and material, and a detailed oil and hazardous substance pollution prevention and removal plan;

(D) a system of surveillance and notice designed to insure earliest possible notice of discharges of oil and hazardous substances and imminent threats of such discharges to the appropriate State and Federal agencies;

(E) establishment of a national center to provide coordination and direction for operations in carrying out the Plan;

(F) procedures and techniques to be employed in identifying, containing, dispersing, and removing oil and hazardous substances;

(G) a schedule, prepared in cooperation with the States, identifying (i) dispersants and other chemicals, if any, that may be used in carrying out the Plan, (ii) the waters in which such dispersants and chemicals may be used, and (iii) the quantities

of such dispersant or chemical which can be used safely in such waters, which schedule shall provide in the case of any dispersant, chemical, or waters not specifically identified in such schedule that the President, or his delegate, may, on a case-by-case basis, identify the dispersants and other chemicals which may be used, the waters in which they may be used, and the quantities which can be used safely in such waters; and

(H) a system whereby the State or States affected by a discharge of oil or hazardous substance may act where necessary to remove such discharge and such State or States may be reimbursed from the fund established under subsection (k) of this section for the reasonable costs incurred in such removal.

The President may, from time to time, as he deems advisable revise or otherwise amend the National Contingency Plan. After publication of the National Contingency Plan, the removal of oil and hazardous substances and actions to minimize damage from oil and hazardous substance discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan.

**(d) Maritime disaster discharges**

Whenever a marine disaster in or upon the navigable waters of the United States has created a substantial threat of a pollution hazard to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and the public and private shorelines and beaches of the United States, because of a discharge, or an imminent discharge, of large quantities of oil, or of a

hazardous substance from a vessel the United States may (A) coordinate and direct all public and private efforts directed at the removal or elimination of such threat; and (B) summarily remove, and, if necessary, destroy such vessel by whatever means are available without regard to any provisions of law governing the employment of personnel or the expenditure of appropriate funds. Any expense incurred under this subsection or under the Intervention on the High Seas Act (or the convention defined in section 2(3) thereof) shall be a cost incurred by the United States Government for the purposes of subsection (f) of this section in the removal of oil or hazardous substance.

**(e) Judicial relief**

In addition to any other action taken by a State or local government, when the President determines there is an imminent and substantial threat to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and public and private property, shorelines, and beaches within the United States, because of an actual or threatened discharge of oil or hazardous substance into or upon the navigable waters of the United States from an onshore or offshore facility, the President may require the United States attorney of the district in which the threat occurs to secure such relief as may be necessary to abate such threat, and the district courts of the United States shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

**(f) Liability for actual costs of removal**

(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (c) negligence on the part of the United States Government, or (D) any act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(2) Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the

part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $50,000,000 except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such facility in any court of competent jurisdiction to recover such costs. The Administrator is authorized, by regulation, after consultation with the Secretary of Commerce and the Small Business Administration, to establish reasonable and equitable classifications of those onshore facilities having a total fixed storage capacity of 1,000 barrels or less which he determines because of size, type, and location do not present a substantial risk of the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, and apply with respect to such classifications differing limits of liability which may be less than the amount contained in this paragraph.

(3) Except where an owner or operator of an offshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any

such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance in discharge in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $50,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such a facility in any court of competent jurisdiction to recover such costs.

(4) The costs of removal of oil or a hazardous substance for which the owner or operator of a vessel or onshore or offshore facility is liable under subsection (f) of this section shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance in violation of subsection (b) of this section.

(5) The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.

**(g) Third party liability**

Where the owner or operator of a vessel (other than an inland oil barge) carrying oil or hazardous substances as cargo or an onshore or offshore facility which handles or stores oil or hazardous substances in bulk, from which oil or a hazardous substance is discharged in violation of subsection (b) of this section, alleges that such discharge was caused solely by an act or omission of a third party, such owner or operator shall pay to the United States Government the actual costs incurred under subsection (c) of this section for removal of such oil or substance and shall be entitled by subrogation to all rights of the United States Government to recover such costs from such third party under this subsection. In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel

which caused the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, the liability of such third party under this subsection shall not exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred if such owner or operator were liable. If the United States can show that the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.

**(h) Rights against third parties who caused or contributed to discharge**

The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance.

**(i) Recovery of removal costs**

(1) In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section acts to remove such oil or substance in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Claims Court, that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of the foregoing causes.

(2) The provisions of this subsection shall not apply in any case where liability is established pursuant to the Outer Continental Shelf Lands Act, or the Deepwater Port Act of 1974.

(3) Any amount paid in accordance with a judgment of the United States Claims Court pursuant to this section shall be paid from the funds established pursuant to subsection (k) of this section.

**(j) Regulations; penalty**

(1) Consistent with the National Contingency Plan required by subsection (c)(2) of this section, as soon as practicable after October 18, 1972, and from time to time thereafter, the President shall issue regulations consistent with maritime safety and with marine and navigation laws

(A) establishing methods and procedures for removal of discharged oil and hazardous substances, (B) establishing criteria for the development and implementation of local and regional oil and hazardous substance removal contingency plans, (C) establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges, and (D) governing the inspection of vessels carrying cargoes of oil and hazardous substances and the inspection of such cargoes in order to reduce the likelihood of discharges of oil from vessels in violation of this section.

(2) Any owner or operator of a vessel or an onshore facility or an offshore facility and any other person subject to any regulation issued under paragraph (1) of this subsection who fails or refuses to comply with the provisions of any such regulations, shall be liable to a civil penalty of not more than $5,000 for each such violation. This paragraph shall not apply to any owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of subsection (b) of this section unless such owner, operator, or person in charge is otherwise subject to the jurisdiction of the United States. Each violation shall be a separate offense. The President may assess and compromise such penalty. No penalty shall be assessed until the owner, operator, or other person charged shall have been given notice and an opportunity for a hearing on such charge. In determining the amount of the penalty, or the amount agreed upon in compromise, the gravity of the violation, and the demonstrated good faith of the owner, operator, or other person charged in attempting to achieve rapid compliance,

after notification of a violation, shall be considered by the President.

**(k) Authorization of appropriations**

(1) There is hereby authorized to be appropriated to a revolving fund to be established in the Treasury such sums as may be necessary to maintain such fund at a level of $35,000,000 to carry out the provisions of subsections (c), (d), (i), and (l) of this section. Any other funds received by the United States under this section shall also be deposited in said fund for such purposes. All sums appropriated to, or deposited in, said fund shall remain available until expended.

(2) The Secretary of Transportation shall notify the Congress whenever the unobligated balance of the fund is less than $12,000,000, and shall include in such notification a recommendation for a supplemental appropriation relating to the sums that are needed to maintain the fund at the level provided in paragraph (1).

**(l) Administration**

The President is authorized to delegate the administration of this section to the heads of those Federal departments, agencies, and instrumentalities which he determines to be appropriate. Any moneys in the fund established by subsection (k) of this section shall be available to such Federal departments, agencies, and instrumentalities to carry out the provisions of subsections (c) and (i) of this section. Each such department, agency, and instrumentality, in order to avoid duplication of effort, shall whenever appropriate, utilize the

personnel, services, and facilities of other Federal departments, agencies, and instrumentalities.

**(m) Boarding and inspection of vessels; arrest; execution of warrants or other process**

Anyone authorized by the President to enforce the provisions of this section may, except as to public vessels, (A) board and inspect any vessel upon the navigable waters of the United States or the waters of the contiguous zone, (B) with or without a warrant arrest any person who violates the provisions of this section or any regulation issued thereunder in his presence or view, and (C) execute any warrant or other process issued by an officer or court of competent jurisdiction.

**(n) Jurisdiction**

The several district courts of the United States are invested with jurisdiction for any actions, other than actions pursuant to subsection (i)(1) of this section, arising under this section. In the case of Guam and the Trust Territory of the Pacific Islands, such actions may be brought in the district court of Guam, and in the case of the Virgin Islands such actions may be brought in the district court of the Virgin Islands. In the case of American Samoa and the Trust Territory of the Pacific Islands, such actions may be brought in the District Court of the United States for the District of Hawaii and such court shall have jurisdiction of such actions. In the case of the Canal Zone, such actions may be brought in the United States District Court for the District of the Canal Zone.

**(o) Obligation for damages unaffected; local authority not preempted; existing Federal authority not modified or affected**

(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section.

**(p) Financial responsibility**

(1) Any vessel over three hundred gross tons, including any barge of equivalent size, but not including any barge that is not self-propelled and that does not carry oil or hazardous substances as cargo or fuel, using any port or place in the United States or the navigable waters of the United States for any purpose shall establish and maintain under regulations to be prescribed from time to time by the

President, evidence of financial responsibility of, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, to meet the liability to the United States which such vessel could be subjected under this section. In cases where an owner or operator owns, operates, or charters more than one such vessel, financial responsibility need only be established to meet the maximum liability to which the largest of such vessels could be subjected. Financial responsibility may be established by any one of, or a combination of, the following methods acceptable to the President: (A) evidence of insurance, (B) surety bonds, (C) qualification as a self-insurer, or (D) other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States.

(2) The provisions of paragraph (1) of this subsection shall be effective April 3, 1971, with respect to oil and one year after October 18, 1972, with respect to hazardous substances. The President shall delegate the responsibility to carry out the provisions of this subsection to the appropriate agency head within sixty days after October 18, 1972. Regulations necessary to implement this subsection shall be issued within six months after October 18, 1972.

(3) Any claim for costs incurred by such vessel may be brought directly against the insurer or any other person providing evidence of financial responsibility as required under this subsection. In the case of any action pursuant to this subsection such insurer or other person shall be entitled to invoke all rights and defenses which would have been available to the owner or operator if an action had been

brought against him by the claimant, and which would have been available to him if an action had been brought against him by the owner or operator.

(4) Any owner or operator of a vessel subject to this subsection, who fails to comply with the provisions of this subsection or any regulation issued thereunder, shall be subject to a fine of not more than $10,000.

(5) The Secretary of the Treasury may refuse the clearance required by section 91 of Title 46 to any vessel subject to this subsection, which does not have evidence furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

(6) The Secretary of the Department in which the Coast Guard is operated may (A) deny entry to any port or place in the United States or the navigable waters of the United States, to, and (B) detain at the port or place in the United States from which it is about to depart for any other port or place in the United States, any vessel subject to this subsection, which upon request, does not produce evidence furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

**(q) Establishment of maximum limit of liability with respect to onshore or offshore facilities**

The President is authorized to establish, with respect to any class or category of onshore or offshore facilities, a maximum limit of liability under subsections (f)(2) and (3) of this section of less than $50,000,000, but not less than $8,000,000.

**(r) Liability limitations not to limit liability under other legislation**

Nothing in this section shall be construed to impose, or authorize the imposition of, any limitation on liability under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974.

June 30, 1948, c. 758, Title III, § 311, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 862, and amended Dec. 28, 1973, Pub.L. 93-207, § 1(4), 87 Stat. 906; Dec. 27, 1977, Pub.L. 95-217, §§ 57, 58(a)-(g), (i), (k)-(m), 91 Stat. 1593-1596.

# APPENDIX E

## § 6902. Objectives

The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources by —

(1) providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will promote improved solid waste management techniques (including more effective organizationl arrangements), new and improved methods of collection, separation, and recovery of solid waste, and the environmentally safe disposal of nonrecoverable residues;

(2) providing training grants in occupations involving the design, operation, and maintenance of solid waste disposal systems;

(3) prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health;

(4) assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment;

(5) requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date;

(6) minimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment;

(7) establishing a viable Federal-State partnership to carry out the purposes of this chapter and insuring that the

Administrator will, in carrying out the provisions of subchapter III of this chapter give a high priority to assisting and cooperating with States in obtaining full authorization of State programs under subchapter III of this chapter;

(8) providing for the promulgation of guidelines for solid waste collection, transport, separation, recovery, and disposal practices and systems;

(9) promoting a national research and development program for improved solid waste management and resource conservation techniques, more effective organizational arrangements, and new and improved methods of collection, separation, and recovery, and recycling of solid wastes and environmentally safe disposal of nonrecoverable residues;

(10) promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources; and

(11) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste.

(Pub.L. 89-272, Title II, § 1003, as added Pub.L. 94-580 § 2, Oct. 21, 1976, 90 Stat. 2798.)

### § 6943. Requirements for approval of plans

#### (a) Minimum requirements

In order to be approved under section 6947 of this title, each State plan must comply with the following minimum requirements—

(1) The plan shall identify (in accordance with section 6946(b) of this title) (A) the responsibilities of State, local, and regional authorities in the implementation of the State plan, (B) the distribution of Federal funds to the authorities responsible for development and implementation of the State plan, and (C) the means for coordinating regional planning and implementation under the State plan.

(2) The plan shall, in accordance with sections 6944(b) and 6945(a) of this title, prohibit the establishment of new open dumps within the State, and contain requirements that all solid waste (including solid waste originating in other States, but not including hazardous waste) shall be (A) utilized for resource recovery or (B) disposed of in sanitary landfills (within the meaning of section 6944(a) of this title) or otherwise disposed of in an environmentally sound manner.

(3) The plan shall provide for the closing or upgrading of all existing open dumps within the State pursuant to the requirements of section 6945 of this title.

(4) The plan shall provide for the establishment of such State regulatory powers as may be necessary to implement the plan.

(5) The plan shall provide that no State or local government within the State shall be prohibited under State or local law from negotiating and entering into long-term contracts for the supply of solid waste to resource recovery facilities, from entering into long-term contracts for the operation of such facilities, or from securing long-term markets for material and energy recovered from such facilities or for conserving materials or energy by reducing the volume of waste.

(6) The plan shall provide for such resource conservation or recovery and for the disposal of solid waste in

sanitary landfills or any combination of practices so as may be necessary to use or dispose of such waste in a manner that is environmentally sound.

**(b)[1] Discretionary plan provisions relating to recycled oil**

Any State plan submitted under this subchapter may include, at the option of the State, provisions to carry out each of the following:

(1) Encouragement, to the maximum extent feasible and consistent with the protection of the public health and the environment, of the use of recycled oil in all appropriate areas of State and local government.

(2) Encouragement of persons contracting with the State to use recycled oil to the maximum extent feasible, consistent with protection of the public health and the environment.

(3) Informing the public of the uses of recycled oil.

(4) Establishment and implementation of a program (including any necessary licensing of persons and including the use, where appropriate, of manifests) to assure that used oil is collected, transported, treated, stored, reused, and disposed of, in a manner which does not present a hazard to the public health or the environment.

Any plan submitted under this chapter before October 15, 1980, may be amended, at the option of the State, at any time after such date to include any provision referred to in this subsection.

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[1] So in original. Another subsec. (b) is set out below.

**(b)[2] Energy and materials conservation and recovery feasibility planning and assistance**

(1) A State which has a plan approved under this subchapter or which has submitted a plan for such approval shall be eligible for assistance under section 6948(a)(3) of this title if the Administrator determines that under such plan the State will —

(A) analyze and determine the economic and technical feasibility of facilities and programs to conserve resources which contribute to the waste stream or to recover energy and materials from municipal waste;

(B) analyze the legal, institutional, and economic impediments to the development of systems and facilities for conservation of energy or materials which contribute to the waste stream or for the recovery of energy and materials from municipal waste and make recommendations to appropriate governmental authorities for overcoming such impediments;

(C) assist municipalities within the State in developing plans, programs, and projects to conserve resources or recover energy and materials from municipal waste; and

(D) coordinate the resource conservation and recovery planning under subparagraph (C).

(2) The analysis referred to in paragraph (1)(A) shall include —

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[2] So in original. Another subsec. (b) is set out above.

(A) the evaluation of, and establishment of priorities among, market opportunities for industrial and commercial users of all types (including public utilities and industrial parks) to utilize energy and materials recovered from municipal waste;

(B) comparisons of the relative costs of energy recovered from municipal waste in relation to the costs of energy derived from fossil fuels and other sources;

(C) studies of the transportation and storage problems and other problems associated with the development of energy and materials recovery technology, including curbside source separation;

(D) the evaluation and establishment of priorities among ways of conserving energy or materials which contribute to the waste stream;

(E) comparison of the relative total costs between conserving resources and disposing of or recovering such waste; and

(F) studies of impediments to resource conservation or recovery, including business practices, transportation requirements, or storage difficulties.

Such studies and analyses shall also include studies of other sources of solid waste from which energy and materials may be recovered or minimized.

**(c) Energy and materials conservation and recovery feasibility planning and assistance**

(1) A State which has a plan approved under this subchapter or which has submitted a plan for such approval

shall be eligible for assistance under section 6948(a)(3) of this title if the Administrator determines that under such plan the State will —

(A) analyze and determine the economic and technical feasibility of facilities and programs to conserve resources which contribute to the waste stream or to recover energy and materials from municipal waste;

(B) analyze the legal, institutional, and economic impediments to the development of systems and facilities for conservation of energy or materials which contribute to the waste stream or for the recovery of energy and materials from municipal waste and make recommendations to appropriate governmental authorities for overcoming such impediments;

(C) assist municipalities within the State in developing plans, programs, and projects to conserve resources or recover energy and materials from municipal waste; and

(D) coordinate the resource conservation and recovery planning under subparagraph (C).

(2) The analysis referred to in paragraph (1)(A) shall include —

(A) the evaluation of, and establishment of priorities among, market opportunities for industrial and commercial users of all types (including public utilities and industrial parks) to utilize energy and materials recovered from municipal waste;

(B) comparisons of the relative costs of energy recovered from municipal waste in relation to the

costs of energy derived from fossil fuels and other sources;

(C) studies of the transportation and storage problems and other problems associated with the development of energy and materials recovery technology, including curbside source separation;

(D) the evaluation and establishment of priorities among ways of conserving energy or materials which contribute to the waste stream;

(E) comparison of the relative total costs between conserving resources and disposing of or recovering such waste; and

(F) studies of impediments to resource conservation or recovery, including business practices, transportation requirements, or storage difficulties.

Such studies and analyses shall also include studies of other sources of solid waste from which energy and materials may be recovered or minimized.

**(d) Size of waste-to-energy facilities**

Notwithstanding any of the above requirements, it is the intention of this chapter and the planning process developed pursuant to this chapter that in determining the size of the waste-to-energy facility, adequate provision shall be given to the present and reasonably anticipated future needs of the recycling and resource recovery interest within the area encompassed by the planning process.

(Pub.L. 89-272, Title II, § 4003, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2814, and amended Pub.L. 96-463, § 5(a), (b), Oct. 15, 1980, 94 Stat. 2056; Pub.L. 96-482, §§ 18, 32(d), Oct. 21, 1980, 94 Stat. 2345, 2353.)

## § 6944. Criteria for sanitary landfills; sanitary landfills required for all disposal

### (a) Criteria for sanitary landfills

Not later than one year after October 21, 1976, after consultation with the States, and after notice and public hearings, the Administrator shall promulgate regulations containing criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps within the meaning of this chapter. At a minimum, such criteria shall provide that a facility may be classified as a sanitary landfill and not an open dump only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility. Such regulations may provide for the classification of the types of sanitary landfills.

### (b) Disposal required to be in sanitary landfills, etc.

For purposes of complying with section 6943(2) of this title each State plan shall prohibit the establishment of open dumps and contain a requirement that disposal of all solid waste within the State shall be in compliance with such section 6943(2) of this title.

### (c) Effective date

The prohibition contained in subsection (b) of this section shall take effect on the date six months after the date of promulgation of regulations under subsection (a) of this section.

(Pub.L. 89-272, Title II, § 4004, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat 2815.)

# APPENDIX F

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

L.A. 31850
Super. Ct.
No. C 166219

**COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, a public agency,**

*Plaintiff-Respondent,*

*vs.*

**LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, et al.,**

*Defendants-Petitioners.*

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# PETITION FOR REHEARING

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TO THE HONORABLE ROSE ELIZABETH BIRD, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Plaintiff and Respondent County Sanitation District No. 2 of Los Angeles County ("District") respectfully requests the Court to give this matter reconsideration and to grant the District a rehearing for the following reasons:

1. The Court has misapplied its new standard for determination of the legality of public sector strikes to the facts in this case;

2. The Court's new standard for determination of the legality of public sector strikes as applied to the District's employees impermissibly interferes with the District's obligations under federal law; and

3. In any event, remand to the Superior Court to take evidence and render findings under this new standard is appropriate.

## I

## THE COURT HAS MISAPPLIED ITS NEW STANDARD FOR DETERMINATION OF THE LEGALITY OF PUBLIC SECTOR STRIKES TO THE FACTS IN THIS CASE.

The Court has held that the prior common law prohibition against all public employee strikes is no longer desirable under common law in this State. The Court has nevertheless imposed limitations on the right to strike recognized in this case, based upon considerations of public health and safety. The Court further concluded that the facts in this case did not fall within these health and safety limitations. Reasoning that there was no imminent threat to public health or safety in connection with the strike, the Court found that "the legality of the strike would have been upheld under [the Court's] newly adopted standard." Slip op. at p. 40. Even accepting the Court's change in the common law, the Court has misapplied its newly enunciated standard for determining the legality of public employee strikes to the strike in this case.

The standard this Court has formulated is as follows:

> "[S]trikes by public employees are not unlawful at common law unless or until it is clearly

> demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public. This standard allows exceptions in certain essential areas of public employment (e.g., the prohibition against firefighters and law enforcement personnel) and also requires the courts to determine on a case-by-case basis whether the public interest overrides the basic right to strike."

Slip op. at p. 38. Under this standard, the Court recognized that some categories of public sector strikes are *per se* illegal, since employees in those categories perform "essential services," the absence of which will virtually always constitute an imminent threat to public health or safety. Slip op. at pp. 36, 37.

The Court included in the category of "essential services," those provided by firefighters and law enforcement personnel. Slip op. at p. 39. This is appropriate not because there necessarily will be fires or an increase in criminal activity, or that fire or police departments necessarily will be unable to provide fire and police protection during such strikes, but because the clear *potential* for irreparable harm to public health and safety is always present in such cases. Additionally, when the threatened damage in such strikes occurs, such as, for example, uncontrolled fires or looting, it is generally too late for judicial intervention, since the threatened damage will almost always occur before the courts are able to react.

The services performed by the District's sanitation workers are "essential" in the same sense as those performed by firefighters and police. The District operates a complex network of sewage treatment facilities, which processes billions of gallons of raw sewage each week. At

any time, and without prior warning, the sophisticated systems and equipment essential to the processing of sewage can break down. Accordingly, the District's employees must constantly monitor and maintain the treatment plants. Therefore, any strike activity clearly entails the threat of interruption of the District's services and concomitant irreparable harm to public health. More importantly, the potential harm can occur far more quickly than the District could seek and obtain judicial relief.

A few examples easily illustrate this problem. The District operates several treatment plants which discharge effluent directly into the San Gabriel River. (R.Tr. 261; Ex. 102 through Ex. 119) If any of these treatment plants became nonoperational for any reason (e.g., if the disinfection/chlorination system[1] broke down), sewage with its attendant pathogenic microorganisms would begin flowing into the San Gabriel River. This situation, with its potentially devastating consequences, would last as long as the critical systems at these upstream plants were nonoperational. Since a breakdown to any critical system at such plants may occur with little or no warning, the absence of workers due to strike activities would have an immediate and irreparable impact on the public health.

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[1] The disinfection/cholrination systems at the District's sewage treatment plants utilize chlorine, an extremely toxic chemical. In the event of a leak or other problem associated with the chlorine, the District generally would have no choice but to shut this system down, thus discharging sewage into the San Gabriel River, until maintenance employees could be brought in to correct the problem. Further, a breakdown in this system could result in chlorine escaping in the form of a gas, a threat to public health wholly separate from the problems associated with sewage.

Other critical problems are presented at the District's Joint Water Pollution Control Plant in Carson ("JWPCP"), when employees are permitted to strike. For example, if the effluent pumps at the JWPCP stopped (as almost happened in this case), in hours the plant would be flooded by inflowing sewage. In less than a day, sewage could back up sufficiently to begin overflowing into the streets through manholes, again bringing the public into direct contact with raw sewage. Furthermore, since most of the JWPCP's critical equipment is underground, the flooding which was averted in this case would have rendered the JWPCP nonoperational for at least several months. Moreover, the District's only option, once the effluent pumps were operational, would be to pump hundreds of millions of gallons of raw sewage each day into the Pacific Ocean.[2] In short, the consequences of a mechanical breakdown at the JWPCP potentially could be far worse, and certainly less susceptible to repair, than damage caused by fires or looting. *See State of California v. City and County of San Francisco*, 94 Cal.App.3d 522, 156 Cal.Rptr. 542 (1979) (six-day sewage worker strike — court detailed the incalculable harm the discharge of 420 million gallons of sewage caused, a mere one-tenth of the amount potentially involved here in the 11-day strike); *Caso v. District Council 37, American Federation etc. Municipal Employees*, 43 App.Div.2d 159, 350 N.Y.S.2d 173 (1973) (sanitation strike resulted in discharge of one billion gallons of untreated sewage into East River).

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[2] At the time of the strike nine years ago, the District was processing 450 million gallons of raw sewage each day. (R. Tr. 261; Ex. 102 through Ex. 119)

The Court assumes, without basis in the record, that the District could have marshalled evidence of an imminent breakdown at its sewage treatment plants in time to present it to the Superior Court, to obtain an injunction, and to enforce it against sufficient employees to avert the potential disaster such a breakdown could cause. This simply is not the case. The Court's conclusion therefore places the District in the untenable position of not being able to seek injunctive relief until something has gone wrong. At that point, it will probably be too late to avoid irreparable harm. For this reason, the fact that the District was able to keep its sewage treatment plants operating during the strike does not render the strike legal, any more than a strike by firefighters or police would be legal simply because supervisory personnel were able to avert disaster.

In sum, the District respectfully submits that the strike in this case was illegal even under the Court's newly enunciated standard. Even though the District, through the use of extraordinary and costly measures, was able to operate during the strike, the strike nevertheless constituted an imminent threat of irreparable harm to the public health. Accordingly, the judgment in this case should be reinstated.

## II

## THE COURT'S STANDARD FOR DETERMINATION OF THE LEGALITY OF PUBLIC SECTOR STRIKES AS APPLIED TO THE DISTRICT'S EMPLOYEES IMPERMISSIBLY INTERFERES WITH THE DISTRICT'S OBLIGATIONS UNDER FEDERAL LAW.

To the extent the Court's new standard for determination of the legality of public sector strikes permits some interruption of essential sewage treatment services prior to enjoining a strike by sanitation employees, it impermissibly interferes with federal statutory policy concerning control of water pollution and the disposal of sewage and other wastes.

The Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, sets forth a comprehensive regulatory scheme expressly designed to limit the discharge of pollutants into the nation's navigable waters, including the Pacific Ocean. To achieve the goals set forth in this act, the act and regulations promulgated thereunder place limitations on the quality of effluent discharge, *inter alia*, from publicly-owned sewage treatment plants, and include substantial civil and criminal penalties for violation of these limitation standards. *See State of California v. City and County of San Francisco, supra;* 33 U.S.C. §§ 1311, 1312, 1317, 1318, 1319 & 1345; 40 C.F.R. § 401.1 *et seq.* Other federal statutes regulate the disposition of solid wastes and other materials on sanitary landfills. *See* Federal Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.*

As set forth in Part I, *supra*, the Court's disposition of this case clearly permits the District's employees to attempt interruption of the District's services by striking, and apparently, renders such activities illegal only if the employees succeed in curtailing services. However, application of the court's new standard in this fashion clearly conflicts with the federal policy expressed in the above statutes. The only sure method to prevent a strike from interrupting processing of sewage and other waste material is to prevent the strike. Any other approach necessarily

involves the threat of impermissible effluent discharge, since the courts cannot react quickly enough under the Court's standard as applied in this case.

In sum, the Court must apply its new standard, based upon an imminent threat to public health or safety, in harmony with federal environmental policies and statutes. Any application which permits sanitation workers, such as those of the District, to strike conflicts with these policies and statutes and cannot stand. The District therefore respectfully requests that the Court reconsider the application of its new standard to the strike in this case, find the strike to be illegal and reinstate the judgment.

## III

## IN ANY EVENT, REMAND TO THE SUPERIOR COURT TO TAKE EVIDENCE AND RENDER FINDINGS UNDER THE NEW STANDARD IS APPROPRIATE.

As the Court correctly notes in the plurality opinion, its holding that public sector strikes are not necessarily illegal constitutes a change in the common law in California, which heretofore prohibited all strikes by public sector employees. Slip.op. at p. 1. Accordingly, whether the strike in this case constituted an imminent threat to public health or safety simply was not an issue before the Superior Court. For this reason, the Superior Court made no findings on this question.

The District submits that an imminent threat to public health and safety already appears in the record. Should the Court disagree, however, a remand of this case is proper. Inasmuch as the Court's change in the law has now made

an issue of whether the strike constituted an imminent threat to public health or safety, it is appropriate to allow the District opportunity to augment the record and permit the Superior Court to render findings and conclusions with respect to this question. *See Green v. Superior Court*, 10 Cal.3d 616, 638, 111 Cal.Rptr. 704, 513 P.2d 1168 (1974) (remand to Superior Court necessary to consider the breach of implied warranty of habitability recognized by the Supreme Court in that case). The District therefore respectfully submits that remand of the case to the Superior Court for appropriate presentation of evidence and findings on the issues presented under the Court's newly enunciated standard is proper.

## IV

## CONCLUSION

For all of the foregoing reasons, the District respectfully requests that this Court vacate its decision in this proceeding and reinstate the judgment of the Superior Court, or in the alternative, that this Court remand this cause to the Superior Court for further findings and presentation of evidence.

Dated: May 23, 1985

Respectfully submitted,

MUSICK, PEELER & GARRETT

By _____
Steven D. Weinstein

*Attorneys for COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES*

# APPENDIX G

**ORDER DENYING REHEARING**
Order Due July 12, 1985
L.A. No. 31850

**IN THE SUPREME COURT**
**OF THE STATE OF CALIFORNIA**
**IN BANK**

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COUNTY SANITATION DISTRICT NO. 2
OF LOS ANGELES COUNTY,
*Respondent;*

v.

LOS ANGELES COUNTY EMPLOYEES
ASSOCIATION, LOCAL 660, ETC., ET AL.,
*Appellants.*

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FILED JUNE 27, 1985
Laurence P. Gill, Clerk

espondent's petition for rehearing DENIED.

BIRD
*Chief Justice*

# APPENDIX H

# PART 241-GUIDELINES FOR THE LAND DISPOSAL OF SOLID WASTES

## Subpart A—General Provisions

Sec.

241.100 Scope.
241.101 Definitions.

## Subpart B-Requirements and Recommended Procedures

241.200 Solid wastes accepted.
241.200-1 Requirement.
241.200-2 Recommended procedures: Design.
241.200-3 Recommended procedures: Operations.
241.201 Solid wastes excluded.
241.201-1 Requirement.
241.201-2 Recommended procedures: Design.
241.201-3 Recommended procedures: Operations.
241.202 Site Selection.
241.202-1 Requirement.
241.202-2 Recommended procedures: Design.
241.202-3 Recommended procedures: Operations.
241.203 Design.
241.203-1 Requirement.
241.203-2 Recommended procedures: Design.
241.203-3 Recommended procedures: Operations.
241.204 Water quality.
241.204-1 Requirement.

241.204-2 Recommended procedures: Design.
241.204-3 Recommended procedures: Operations.
241.205 Air quality.
241.205-1 Requirement.
241.205-2 Recommended procedures: Design.
241.205-3 Recommended procedures: Operations.
241.206 Gas control.
241.206-1 Requirement.
241.206-2 Recommended procedures: Design.
241.206-3 Recommended procedures: Operations.
241.207 Vectors.
241.207-1 Requirement.
241.207-2 Recommended procedures: Design.
241.207-3 Recommended procedures: Operations.
241.208 Aesthetics.
241.208-1 Requirement.
241.208-2 Recommended procedures: Design.
241.208-3 Recommended procedures: Operations
241.209 Cover material.
241.209-1 Requirement.
241.209-2 Recommended procedures: Design.
241.209-3 Recommended procedures: Operations.
241.210 Compaction.
241.210-1 Requirement.
241.210-2 Recommended procedures: Design.
241.210-3 Recommended procedures: Operations.
241.211 Safety.
241.211-1 Requirement.

241.211-2 Recommended procedures: Design.

241.211-3 Recommended procedures: Operations.

241.212 Records.

241.212-1 Requirement.

241.212-2 Recommended procedures: Design.

241.212-3 Recommended procedures: Operations.

AUTHORITY: Section 209(a) of the Solid Waste Disposal Act of 1965 (Pub.L. 89-272) as amended by the Resource Recovery Act of 1970 (Pub.L 91-512).

SOURCE: 39 FR 29333, Aug. 14, 1974, unless otherwise noted.

## Subpart A-General Provisions

### § 241.100 Scope.

(a) The guidelines are generally applicable to the land disposal of all solid waste materials. However, the guidelines do not apply to hazardous, agricultural, and mining wastes because of the lack of sufficient information upon which to base recommended procedures. Concerning the specific practice of land disposal of milled solid wastes, EPA guidance is contained in a position statement issued in November 1972.

(b) The requirement sections contained herein delineate minimum levels of performance required of any solid waste land disposal site operation. The recommended procedures sections are presented to suggest preferred methods by which the objectives of the requirements can be realized.[1]

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[1] Further guidance may be found in the EPA publication, "Sanitary Landfill Design and Operations," which served as a basis for the

The recommended procedures are based on the practice of sanitary landfilling municipal solid waste: Normally, residential, and commercial solid waste generated within a community. Sanitary landfilling is the most widely applied environmentally acceptable land disposal method. If techniques other than the recommended procedures are used, or wastes other than municipal solid wastes are disposed, it is the obligation of the proposed facility's owner and operator to demonstrate to the responsible agency in advance by means of engineering calculations and data that the techniques employed will satisfy the requirements.

(c) Pursuant to section 211 of the Solid Waste Disposal Act, as amended, these guidelines are mandatory for Federal agencies. In addition, they are recommended to State, interstate, regional, and local government agencies for use in their activities.

(d) These guidelines are intended to provide for environmentally acceptable land disposal site operations. The guidelines do not establish new standards but set forth requirements and recommended procedures to ensure that the design, construction, and operation of both existing and future land disposal sites meet the health and environmental standards for the area in which they are located. The guidelines are intended to apply equally to all solid waste generated by Federal agencies, regardless of whether processed or disposed of on or off Federal property; and solid waste generated by non-Federal entities, but processed or disposed of on Federal property. However, in the case of many Federal facilities such as Post Offices, military recruiting stations, and other offices, local community solid waste processing and disposal facilities are utilized, and

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development of these guidelines.

processing and disposal is not within the management control of the Federal agency. Thus, implementation of the guidelines can be expected only in those situations where the Federal agency is able to exercise direct management control over the processing and disposal operations. However, every effort must be made by the responsible agency, where off-site facilities are utilized, to attain processing and disposal facilities that are in compliance with the guidelines. Where non-Federal generated solid waste is processed and disposed of on Federal land and/or facilities, those facilities and/or sites must be in compliance with these guidelines. Determination of compliance to meet the requirements of the guidelines rests with the responsible agency, and they have the authority to determine how such compliance may occur.

[39 FR 29333, Aug. 14, 1974; 40 FR 5159, Feb. 4, 1975]

### § 241.101 Definitions.

As used in these guidelines:

(a) "Cell" means compacted solid wastes that are enclosed by natural soil or cover material in a land disposal site.

(b) "Cover material" means soil or other suitable material that is used to cover compacted solid wastes in a land disposal site.

(c) "Daily cover" means cover material that is spread and compacted on the top and side slopes of compacted solid waste at least at the end of each operating day in order to control vectors, fire, moisture, and erosion and to assure an aesthetic appearance.

(d) "Final cover" means cover material that serves the same functions as daily cover but, in addition, may be permanently exposed on the surface.

(e) "Free moisture" means liquid that will drain freely by gravity from solid materials.

(f) "Groundwater" means water present in the saturated zone of an aquifer.

(g) "Hazardous wastes" means any waste or combination of wastes which pose a substantial present or potential hazard to human health or living organisms because such wastes are non-degradable or persistent in nature or because they can be biologically magnified, or because they can be lethal, or because they may otherwise cause or tend to cause detrimental cumulative effects.

(h) "Infectious waste" means: (1) Equipment, instruments, utensils, and fomites of a disposable nature from the rooms of patients who are suspected to have or have been diagnosed as having a communicable disease and must, therefore, be isolated as required by public health agencies; (2) laboratory wastes, such as pathological specimens (e.g. all tissues, specimens of blood elements, excreta, and secretions obtained from patients or laboratory animals) and disposable fomites (any substance that may harbor or transmit pathogenic organisms) attendant thereto; (3) surgical operating room pathologic specimens and disposable fomites attendant thereto and similar disposable materials from out-patient areas and emergency rooms.

(i) "Intermediate cover" means cover material that serves the same functions as daily cover, but must resist erosion for a longer period of time, because it is applied on areas where additional cells are not to be constructed for extended periods of time.

(j) "Leachate" means liquid that has percolated through solid waste and has extracted dissolved or suspended materials from it.

(k) "Municipal solid wastes" means normally, residential, and commercial solid waste generated within a community.

(l) "Open burning" means burning of solid wastes in the open, such as in an open dump.

(m) "Open dump" means a land disposal site at which solid wastes are disposed of in a manner that does not protect the environment, is susceptible to open burning, and is exposed to the elements, vectors, and scavengers.

(n) "Plans" means reports and drawings, including a narrative operating description, prepared to describe the land disposal site and its proposed operation.

(o) "Residue" means all the solids that remain after completion of thermal processing, including bottom ash, fly ash, and grate siftings.

(p) "Responsible agency" means the organizational element that has the legal duty to ensure that owners, operators or users of land disposal sites comply with these guidelines.

(q) "Runoff" means the portion of precipitation that drains from an area as surface flow.

(r) "Salvaging" means the controlled removal of waste materials for utilization.

(s) "Sanitary landfill" means a land disposal site employing an engineered method of disposing of solid wastes on land in a manner that minimizes environmental hazards by spreading the solid wastes in thin layers, compacting the solid wastes to the smallest practical

volume, and applying and compacting cover material at the end of each operating day.

(t) "Scavenging" means uncontrolled removal of solid waste materials.

(u) "Sludge" means the accumulated semiliquid suspension of settled solids deposited from wastewaters or other fluids in tanks or basins. It does not include solids or dissolved material in domestic sewage or other significant pollutants in water resources, such as silt, dissolved or suspended solids in industrial wastewater effluents, dissolved materials in irrigation return flows or other common water pollutants.

(v) "Solid wastes" means garbage, refuse, sludges, and other discarded solid materials resulting from industrial and commercial operations and from community activities. It does not include solids or dissolved material in domestic sewage or other significant pollutants in water resources, such as silt, dissolved or suspended solids in industrial wastewater effluents, dissolved materials in irrigation return flows or other common water pollutants.

(w) "Vector" means a carrier, usually an arthropod, that is capable of transmitting a pathogen from one organism to another.

(x) "Water table" means the upper water level of a body of groundwater.

(y) "Working face" means that portion of the land disposal site where solid wastes are discharged and are spread and compacted prior to the placement of cover material.

## Subpart B-Requirements and Recommended Procedures

### § 241.200 Solid wastes accepted.

### § 241.200-1 Requirement.

In consultation with the responsible agencies the owner/operator shall determine what wastes shall be accepted and shall identify any special handling required. In general, only wastes for which the facility has been specifically designed shall be accepted; however, other wastes may be accepted if it has been demonstrated to the responsible agency that they can be satisfactorily disposed with the design capability of the facility or after appropriate facility modifications.

### § 241.200-2 Recommended procedures: Design.

The plans should specify the procedures to be employed for wastes requiring special handling.

### § 241.200-3 Recommended procedures: Operations.

(a) Routine sanitary landfill techniques of spreading and compacting solid wastes and placing cover material at the end of each operating day should be used to dispose of municipal solid wastes.

(b) Certain bulky wastes, such as automobile bodies, furniture, and appliances may be salvaged in a controlled manner at a point other than the working face. Otherwise, they should be crushed on solid ground and then pushed onto the working face near the bottom of the cell. Other

bulky items, such as demolition and construction debris, tree stumps, and large timbers, should be pushed onto the working face near the bottom of the cell.

(c) Procedures for disposing of dead animals have been established by law in most States, and the operation should comply accordingly. In most cases, small carcasses should be placed on the working face with other municipal solid wastes and covered immediately. In the absence of applicable State laws, large carcasses should be placed in a pit and provided with a cover of compacted soil or other suitable material to encourage runoff of precipitation.

(d) Water treatment plant sludges containing no free moisture and digested or heat treated waste water treatment plant sludges containing no free moisture should be placed on the working face along with municipal solid wastes and covered with soil or municipal solid wastes. The quantities accepted should be determined by operational problems encountered at the working face.

(e) Incinerator and air pollution control residues containing no free moisture should be incorporated into the working face and covered at such intervals as necessary to prevent them from becoming airborne.

**§ 241.201 Solid wastes excluded.**

**§ 241.201-1 Requirement.**

Using information supplied by the waste generator/owner, the responsible agency and the disposal site owner/operator shall jointly determine specific wastes to be excluded and shall identify them in the plans. The generator/owner of excluded wastes shall consult with the responsible agency in determining an alternative method of

disposal for excluded wastes. The criteria used in considering whether a waste is unacceptable shall include the hydrogeology of the site, the chemical and biological characteristics of the waste, alternative methods available, environmental and health effects, and the safety of personnel. Disposal of pesticides and pesticide containers shall be consistent with the Federal Environmental Pesticides Control Act of 1972 (Pub. L. 92-516) and recommended procedures and regulations promulgated thereunder.

**§ 241.201-2 Recommended procedures: Design.**

Under certain circumstances it may be necessary to accept special wastes at land disposal sites. The following special wastes require specific approval of the responsible agency for acceptance at the site: Hazardous wastes, infectious institutional wastes, bulk liquids and semi-liquids, sludges containing free moisture, highly flammable or volatile substances, raw animal manure, septic tank pumpings, raw sewage sludge, and certain industrial process wastes. Where the use of the disposal site for such wastes is planned, a special assessment is required of the following items: The site characteristics, nature and quantities of the waste, and special design and operations precautions to be implemented to insure environmentally safe disposal.

**§ 241.201-3 Recommended procedures: Operations.**

Regular users of the land disposal site should be provided with a list of the materials to be excluded. The list should also be displayed prominently at the site entrance. If a

regular user persists in making unacceptable deliveries, he should be barred from the site and reported to the responsible agency.

**§ 241.202 Site selection.**

**§ 241.202-1 Requirement.**

Site selection and utilization shall be consistent with public health and welfare, and air and water quality standards and adaptable to appropriate land-use plan.

**§ 241.202-2 Recommended procedures: Design.**

(a) The hydrogeology of the site should be evaluated in order to design site development in a manner to protect or minimize the impact on groundwater resources. Unacceptable hydrogeologic conditions may be altered to render the site acceptable, but all alterations should be detailed in the plans. Precipitation, evapotranspiration, and other climatological conditions should be considered in site selection and design.

(b) Characteristics of on-site soil should be evaluated with respect to their effects on site operations, such as vehicle maneuverability and use as cover material.

(c) Environmental factors, climatological conditions, and socioeconomic factors should be given full consideration as selection criteria.

(d) The site should be accessible to vehicles which the site is designed to serve by all-weather roads leading from the public road systems; temporary roads should be provided as needed to deliver wastes to the working face.

(e) The site should not be located in an area where the attraction of birds would be a hazard to low-flying aircraft.

**§ 241.202-3 Recommended procedures: Operations.**

Not applicable.

**§ 241.203 Design.**

**§ 241.203-1 Requirement.**

Plans for the design, construction, and operation of new sites or modifications to existing sites shall be prepared or approved by a professional engineer. The plans shall be submitted to the responsible agency for review and, if warranted, approval.

**§ 241.203-2 Recommended procedures: Design.**

(a) The types and quantities of all solid wastes expected to be disposed of at the facility should be determined by survey and analysis to form a basis for design.

(b) Site development plans should be prepared or approved by a professional engineer and should include: The various design factors addressed elsewhere in the guidelines, as well as:

(1) Initial and final topographies at contour intervals of 5 feet or less.

(2) Land use and zoning within one-quarter mile of the site including location of all residents, buildings, wells, water courses, arroyos, rock outcroppings, roads, and soil or rock borings. All airports within the vicinity of the site

should be identified to aid in assessing the potential hazard of birds to aircraft.

(3) Location of all utilities within 500 feet of the site.

(4) Employee convenience and equipment maintenance facilities.

(5) Narrative descriptions, with associated drawings, indicating site development and operation procedures.

(c) Plans should describe the projected use of the completed land disposal site. In addition to maintenance programs and provisions, where necessary, for monitoring and controlling decomposition gases and leachate, the plans should address the following ultimate use criteria:

(1) Cultivated Area. The major concern if the completed site is to be cultivated is that the integrity of the final cover not be disturbed by agricultural cultivation activities. In this regard, a sufficient depth of cover material to allow cultivation and to support vegetation should be applied in addition to that recommended for final cover.

(2) Structures. It is not recommended practice to construct major structures on a completed land disposal site. If major structures are to be built near a completed land disposal site, a professional engineer should approve their design and construction including provision for protection against potential hazards of solid waste decomposition gases.

**§ 241.203-3 Recommended procedures: Operations.**

Not applicable.

**§ 241.204 Water quality.**

**§ 241.204-1 Requirement.**

The location, design, construction, and operation of the land disposal site shall conform to the most stringent of applicable water quality standards established in accordance with or effective under the provisions of the Federal Water Pollution Control Act, as amended. In the absence of such standards, the land disposal site shall be located, designed, constructed and operated in such a manner as to provide adequate protection to ground and surface waters used as drinking water supplies.

**§ 241.204-2 Recommended procedures: Design.**

(a) Plans should include:

(1) Current and projected use of water resources in the potential zone of influence of the land disposal site.

(2) Groundwater elevation and movement and proposed separation between the lowest point of the lowest cell and the predicted maximum water table elevation.

(3) Potential interrelationship of the land disposal site, local aquifers, and surface waters based on historical records or other sources of information.

(4) Background and initial quality of water resources in the potential zone of influence of the land disposal site.

(5) Proposed location of observation wells, sampling stations, and testing program planned, when appropriate.

(6) Description of soil and other geologic material to a depth adequate to allow evaluation of the water quality protection provided by the soil and other geologic material.

(7) Provision for surface water runoff control to minimize infiltration and erosion of cover material.

(8) Potential of leachate generation and proposed control systems, where necessary, for the protection of ground and surface water resources.

(b) If a land disposal site is located in a flood plain, it should be protected against at least the 50-year design flood by impervious dikes and other appropriate means to prevent the floodwaters from contacting municipal solid waste.

**§ 241.204-3 Recommended procedures: Operations.**

(a) Surface water courses and runoff should be diverted from the land disposal site (especially from the working face) by means such as trenches, conduits, and proper grading. The land disposal site should be constructed and graded so as to promote rapid surface water runoff without excessive erosion. Regrading should be done as required during construction and after completion to avoid ponding of precipitation and to maintain cover material integrity.

(b) Siltation or retention basins or other approved methods of retarding runoff should be used where necessary to avoid stream siltation or flooding problems due to excessive runoff.

(c) Leachate collection and treatment systems should be used where necessary to protect ground and surface water resources.

(d) Municipal solid wastes and leachate therefrom should not be allowed to contact ground or surface water so as to impair the water's use.

**§ 241.205 Air quality.**

**§ 241.205-1 Requirement.**

The design, construction, and operation of the land disposal site shall conform to applicable ambient air quality standards and source control regulations established under the authority of the Clean Air Act, as amended, or State or local standards effective under that Act, if the latter are more stringent.

**§ 241.205-2 Recommended procedures: Design.**

Plans should include an effective dust control program.

**§ 241.205-3 Recommended procedures: Operations.**

(a) Open burning of municipal solid waste should be prohibited.

(b) Dust control measures should be initiated as necessary to protect the health and safety of facility personnel, nearby residents, and persons using the facility.

**§ 241.206 Gas control.**

**§ 241.206-1 Requirement.**

Decomposition gases generated within the land disposal site shall be controlled on site, as necessary, to avoid posing a hazard to occupants of adjacent property.

### § 241.206-2 Recommended procedures: Design.

Plans should assess the need for gas control and indicate the location and design of any vents, barriers, or other control measures to be provided.

### § 241.206-3 Recommended procedures: Operations.

(a) Decomposition gases should not be allowed to migrate laterally from the land disposal site to endanger occupants of adjacent properties. They should be vented to the atmosphere directly through the cover material, cutoff trenches, or ventilation systems in such a way that they do not accumulate in explosive or toxic concentrations, especially within structures. (Information on the limits of flammability of gases is available in such references as the "Handbook of Chemistry and Physics," 54th ed. CRC Press, Inc., Cleveland, 1973.)

(b) Decomposition gases should not be allowed to concentrate in a manner that will pose an explosion or toxicity hazard.

### § 241.207 Vectors.

### § 241.207-1 Requirement.

Conditions shall be maintained that are unfavorable for the harboring, feeding, and breeding of vectors.

**§ 241.207-2 Recommended procedures: Design.**

Plans should include contingency programs for vector control, and the operator should be prepared at all times to implement those procedures.

**§ 241.207-3 Recommended procedures: Operations.**

Vector control contingency programs should be implemented when necessary to prevent or rectify vector problems.

**§ 241.208 Aesthetics.**

**§ 241.208-1 Requirement**

The land disposal site shall be designed and operated at all times in an aesthetically acceptable manner.

**§ 241.208-2 Recommended procedures: Design.**

Plans should include an effective litter control program.

**§ 241.208-3 Recommended procedures: Operations.**

(a) Portable litter fences or other devices should be used in the immediate vicinity of the working face and at other appropriate locations to control blowing litter. At the end of each operating day, or more often as required, litter should be removed from the fences and incorporated into the cell being used. Alternatively, the litter may be containerized for disposal on the next operating day.

(b) Wastes that are easily moved by wind should be covered, as necessary, to prevent their becoming airborne and scattered.

(c) On-site vegetation should be cleared only as necessary. Natural windbreaks, such as green belts, should be maintained where they will improve the appearance and operation of the land disposal site. Buffer strips should be planted and/or berms constructed as necessary to screen the working force from nearby residences or major roadways.

(d) Salvage operations should be conducted in such a manner as to not detract from the appearance of the land disposal site. Salvaged material should be removed from the land disposal site frequently enough to maintain aesthetic acceptability.

**§ 241.209 Cover material.**

**§ 241.209-1 Requirement.**

Cover material shall be applied as necessary to minimize fire hazards, infiltration of precipitation, odors, and blowing litter; control gas venting and vectors; discourage scavenging; and provide a pleasing appearance.

**§ 241.209-2 Recommended procedures: Design.**

Plans should specify:

(a) Cover material sources and soil classifications (Unified Soil Classification System or U.S. Department of Agriculture Classification System).

(b) Surface grades and side slopes need to promote maximum runoff, without excessive erosion, to minimize infiltration.

(c) Procedures to promote vegetative growth as promptly as possible to combat erosion and improve appearance of idle and completed areas.

(d) Procedures to maintain cover material integrity, e.g., regarding and recovering.

**§ 241.209-3 Recommended procedures: Operations.**

(a) Daily cover should be applied regardless of weather; sources of cover material should, therefore, be accessible on all operating days. The thickness of the compacted daily cover should not be less than 6 inches.

(b) Intermediate cover should be applied on areas where additional cells are not to be constructed for extended periods of time; normally, 1 week to 1 year. The thickness of the compacted intermediate cover should not be less than 1 foot.

(c) Final cover should be applied on each area as it is completed or if the area is to remain idle for over 1 year. The thickness of the compacted final cover should not be less than 2 feet.

**§ 241.210 Compaction.**

**§ 241.210-1 Requirement.**

In order to conserve land disposal site capacity, thereby preserving land resources, and to minimize moisture infiltration and settlement, municipal solid waste and cover

material shall be compacted to the smallest practicable volume.

**§ 241.210-2 Recommended procedures: Design.**

(a) Arrangements should be made and indicated in the plans whereby substitute equipment will be available to provide uninterrupted service during routine equipment maintenance periods or equipment breakdowns.

(b) An equipment maintenance facility should be provided onsite, or appropriate contract arrangements should be made to receive such service.

(c) Equipment manuals, catalogs, and spare parts lists should be compiled and readily available onsite.

**§ 241.210-3 Recommended procedures: Operations.**

(a) Municipal solid waste handling equipment should on any operating day be capable of performing the following functions:

(1) Spread the solid waste accepted in layers no more than 2 feet thick while confining it to the smallest practicable area;

(2) Compact the spread solid wastes to the smallest practicable volume (several such compacted layers will form a cell); and

(3) Place, spread, and compact the cover material over the cell at least by the end of each day's operation.

(b) A preventive maintenance program should be employed to maintain equipment in operating order.

(c) An operating manual describing the various tasks that must be performed during a typical shift should be available to employees for reference.

**§ 241.211 Safety.**

**§ 241.211-1 Requirement.**

The land disposal site shall be designed, constructed, and operated in such a manner as to protect the health and safety of personnel associated with the operation. Pertinent provisions of the Occupational Safety and Health Act of 1970 (Pub.L. 91-596) and regulation promulgated thereunder shall apply.

**§ 241.211-2 Recommended procedures: Design.**

A manual describing safety precautions and procedures to be employed should be developed.

**§ 241.211-3 Recommended procedures: Operations.**

(a) A safety manual should be available for use by employees, and they should be instructed in application of its procedures.

(b) Personal safety devices such as hardhats, gloves, safety glasses, and footwear should be provided to facility employees.

(c) Safety devices, including but not limited to such items as rollover protective structures, seatbelts, audible reverse warning devices, and fire extinguishers should be provided

on all equipment used to spread and compact solid wastes or cover material at the facility.

(d) Provisions should be made to extinguish any fires in wastes being delivered to the site or which occur at the working face or within equipment or personnel facilities.

(e) Communications equipment should be available onsite for emergency situations.

(f) Scavenging should be prohibited at all times to avoid injury and to prevent interference with site operations.

(g) Access to the site should be controlled and should be by established roadways only. The site should be accessible only when operating personnel are on duty. Large containers may be placed at the site entrance so that users can conveniently deposit waste after hours. The containers and the areas around them should be maintained in a sanitary and liter-free condition.

(h) Traffic signs or markers should be provided to promote an orderly traffic pattern to and from the discharge area, maintain efficient operating conditions, and, if necessary, restrict access to hazardous areas. Drivers of manually discharging vehicles should not hinder operation of mechanically discharging vehicles. Vehicles should not be left unattended at the working face or along traffic routes. If a regular user persistently poses a safety hazard, he should be barred from the site and reported to the responsible agency.

### § 241.212 Records.

### § 241.212-1 Requirement.

The owner/operator of the land disposal site shall maintain records and monitoring data to be provided, as required, to the responsible agency.

### § 241.212-2 Recommended procedures: Design.

Where appropriate, plans should prescribe methods to be used in maintaining records and monitoring the environmental impact of the land disposal site. Information on recording and monitoring requirements should be obtained from the responsible agency.

### § 241.212-3 Recommended procedures: Operations

(a) Records should be maintained covering at least the following:

(1) Major operational problems, complaints, or difficulties.

(2) Qualitative and quantitative evaluation of the environmental impact of the land disposal site, with regard to the effectiveness of gas and leachate control, including results of: (i) Leachate sampling and analyses; (ii) gas sampling and analyses; (iii) ground and surface water quality sampling and analyses upstream and downstream of the site.

(3) Vector control efforts.

(4) Dust and litter control efforts.

(5) Quantitative measurements of the solid wastes handled. This should be accomplished through routine or periodic utilization of scales and topographic surveys of the site.

(6) Description of solid waste materials received, identified by source of materials.

(b) Upon completion of the site, a detailed description, including a plat, should be recorded with the area's land recording authority. The description should include general types and locations of wastes, depth of fill, and other information of interest to potential landowners.

## Subpart A—General Provisions

### PART 257 CRITERIA FOR CLASSIFICATION OF SOLID WASTE DISPOSAL FACILITIES AND PRACTICES

Sec.

257.1 Scope and purpose.

257.2 Definitions.

257.3 Criteria for classification of solid waste disposal facilities and practices.

257.3-1 Floodplains.

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257.3-4 Ground water.

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257.3-6 Disease.

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257.3-8 Safety.

257.4 Effective date.

Appendix I

Appendix II

Authority: Sec. 1008(a)(3) and sec. 4004(a), Pub.L. 94-580, 90 Stat. 2803 and 2815 (42 U.S.C. 6907(a)(3) and 6944(a)); sec. 405(d), Pub.L. 95-217, 91 Stat. 1606 (33 U.S.C. 1345(d)).

Source: 44 FR 53460, Sept. 13, 1979, unless otherwise noted.

### § 257.1 Scope and purpose.

(a) These criteria are for use under the Resource Conservation and Recovery Act (the Act) in determining which solid waste disposal facilities and practices pose a reasonable probability of adverse effects on health or the environment. Unless otherwise provided, these criteria are adopted for purposes of both Section 1008(a)(3) and Section 4004(a) of the Act.

(1) Facilities failing to satisfy criteria adopted for purposes of Section 4004(a) will be considered open dumps for purposes of State solid waste management planning under the Act.

(2) Practices failing to satisfy criteria adopted for purposes of Section 1008(a)(3) constitute open dumping, which is prohibited under Section 4005 of the Act.

(b) These criteria also provide guidelines for sludge utilization and disposal under Section 405(d) of the Clean Water Act, as amended. To comply with Section 405(e) the owner or operator of any publicly owned treatment works

must not violate these criteria in the disposal of sludge on the land.

(c) These criteria apply to all solid waste disposal facilities and practices with the following exceptions:

(1) The criteria do not apply to agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners.

(2) The criteria do not apply to overburden resulting from mining operations intended for return to the mine site.

(3) The criteria do not apply to the land application of domestic sewage or treated domestic sewage. The criteria do apply to disposal of sludges generated by treatment of domestic sewage.

(4) The criteria do not apply to the location and operation of septic tanks. The criteria do, however, apply to the disposal of septic tank pumpings.

(5) The criteria do not apply to solid or dissolved materials in irrigation return flows.

(6) The criteria do not apply to industrial discharges which are point sources subject to permits under Section 402 of the Clean Water Act, as amended.

(7) The criteria do not apply to source, special nuclear or byproduct material as defined by the Atomic Energy Act, as amended (68 Stat. 923).

(8) The criteria do not apply to hazardous waste disposal facilities which are subject to regulation under Subtitle C of the Act.

(9) The criteria do not apply to disposal of solid waste by underground well injection subject to the regulations (40 CFR Part 146) for the Underground Injection Control Program (UICP) under the Safe Drinking Water Act, as amended, 42 U.S.C. 3007 et seq.

[44 FR 53460, Sept. 13, 1979, as amended at 46 FR 47052, Sept. 23, 1981]

**§ 257.2 Definitions.**

The definitions set forth in Section 1004 of the Act apply to this part. Special definitions of general concern to this part are provided below, and definitions especially pertinent to particular sections of this part are provided in those sections.

"Disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

"Facility" means any land and appurtenances thereto used for the disposal of solid wastes.

"Leachate" means liquid that has passed through or emerged from solid waste and contains soluble, suspended or miscible materials removed from such wastes.

"Open dump" means a facility for the disposal of solid waste which does not comply with this part.

"Practice" means the act of disposal of solid waste.

"Sanitary landfill" means a facility for the disposal of solid waste which complies with this part.

"Sludge" means any solid, semisolid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility or any other such waste having similar characteristics and effect.

"Solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved materials in domestic sewage, or solid or dissolved material in irrigation return flows or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as amended (86 Stat. 880), or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

"State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

[44 FR 53460, Sept. 13, 1979; 44 FR 58910, Oct. 12, 1979]

### § 257.3 Criteria for classification of solid waste disposal facilities and practices.

Solid waste disposal facilities or practices which violate any of the following criteria pose a reasonable probability of adverse effects on health or the environment:

#### § 257.3-1 Floodplains.

(a) Facilities or practices in floodplains shall not restrict the flow of the base flood, reduce the temporary water storage capacity of the floodplain, or result in washout of solid waste, so as to pose a hazard to human life, wildlife, or land or water resources.

(b) As used in this section:

(1) "Based flood" means a flood that has a 1 percent or greater chance of recurring in any year or a flood of a magnitude equalled or exceeded once in 100 years on the average over a significantly long period.

(2) "Floodplain" means the lowland and relatively flat areas adjoining inland and coastal waters, including flood-prone areas of offshore islands, which are inundated by the base flood.

(3) "Washout" means the carrying away of solid waste by waters of the base flood.

[44 FR 53460, Sept. 13, 1979; 44 FR 54708, Sept. 21, 1979]

**§ 257.3-2 Endangered species.**

(a) Facilities or practices shall not cause or contribute to the taking of any endangered or threatened species of plants, fish, or wildlife.

(b) The facility or practice shall not result in the destruction or adverse modification of the critical habitat of endangered or threatened species as identified in 50 CFR Part 17.

(c) As used in this section:

(1) "Endangered or threatened species" means any species listed as such pursuant to Section 4 of the Endangered Species Act.

(2) "Destruction or adverse modification" means a direct or indirect alteration of critical habitat which appreciably diminishes the likelihood of the survival and recovery of threatened or endangered species using that habitat.

(3) "Taking" means harassing, harming, pursuing, hunting, wounding, killing, trapping, capturing, or collecting or attempting to engage in such conduct.

**§ 257.3-3 Surface water.**

(a) For purposes of Section 4004(a) of the Act, a facility shall not cause a discharge of pollutants into waters of the United States that is in violation of the requirements of the National Pollutant Discharge Elimination System (NPDES) under Section 402 of the Clean Water Act, as amended.

(b) For purposes of Section 4004(a) of the Act, a facility shall not cause a discharge of dredged material or fill material to waters of the United States that is in violation of the requirements under Section 404 of the Clean Water Act, as amended.

(c) A facility or practice shall not cause non-point source pollution of waters of the United States that violates applicable legal requirements implementing an areawide or Statewide water quality management plan that has been approved by the Administrator under Section 208 of the Clean Water Act, as amended.

(d) Definitions of the terms "Discharge of dredged material", "Point source", "Pollutant", "Waters of the United States", and "Wetlands" can be found in the Clean Water Act, as amended, 33 U.S.C. 1251 et seq., and implementing regulations, specifically 33 CFR Part 323 (42 FR 37122, July 19, 1977).

[44 FR 53460, Sept. 13, 1979, as amended at 46 FR 47052, Sept. 23, 1981]

**§ 257.3-4 Ground water.**

(a) A facility or practice shall not contaminate an underground drinking water source beyond the solid waste boundary or beyond an alternative boundary specified in accordance with paragraph (b) of this section.

(b) (1) For purposes of Section 1008(a)(3) of the Act or Section 405(d) of the CWA, a party charged with open dumping or a violation of Section 405(e) may demonstrate that compliance should be determined at an alternative boundary in lieu of the solid waste boundary. The court shall establish such an alternative boundary only if it finds that such a change would not result in contamination of ground water which may be needed or used for human consumption. This finding shall be based on analysis and consideration of all of the following factors that are relevant:

(i) The hydrogeological characteristics of the facility and surrounding land, including any natural attenuation and dilution characteristics of the aquifer;

(ii) The volume and physical and chemical characteristics of the leachate;

(iii) The quantity, quality, and direction of flow of ground water underlying the facility;

(iv) The proximity and withdrawal rates of groundwater users;

(v) The availability of alternative drinking water supplies;

(vi) The existing quality of the ground water, including other sources of contamination and their cumulative impacts on the ground water;

(vii) Public health, safety, and welfare effects.

(2) For purposes of Sections 4004(a) and 1008(a)(3), the State may establish an alternative boundary for a facility to be used in lieu of the solid waste boundary only if it finds that such a change would not result in the contamination of ground water which may be needed or used for human consumption. Such a finding shall be based on an analysis and consideration of all of the factors identified in paragraph (b)(1) of this section that are relevant.

(c) As used in this section:

(1) "Aquifer" means a geologic formation, group of formations, or portion of a formation capable of yielding usable quantities of ground water to wells or springs.

(2) "Contaminate" means introduce a substance that would cause:

(i) The concentration of that substance in the ground water to exceed the maximum contaminant level specified in Appendix I, or

(ii) An increase in the concentration of that substance in the ground water where the existing concentration of that substance exceeds the maximum contaminant level specified in Appendix I.

(3) "Ground water" means water below the land surface in the zone of saturation.

(4) "Underground drinking water source" means:

(i) An aquifer supplying drinking water for human consumption, or

(ii) An aquifer in which the ground water contains less than 10,000 mg/1 total dissolved solids.

(5) "Solid waste boundary" means the outermost perimeter of the solid waste (projected in the horizontal plane) as it would exist at completion of the disposal activity.

[44 FR 53460, Sept. 13, 1979, as amended at 46 FR 47052, Sept. 23, 1981]

### § 257.3-5 Application to land used for the production of food-chain crops (interim final).

(a) Cadmium. A facility or practice concerning application of solid waste to within one meter (three feet) of the surface of land used for the production of food-chain crops shall not exist or occur, unless in compliance with all requirements of paragraph (a)(1) (i) through (iii) of this section or all requirements of paragraph (a)(2) (i) through (iv) of this section.

(1)(i) The pH of the solid waste and soil mixture is 6.5 or greater at the time of each solid waste application, except for solid waste containing cadmium at concentrations of 2 mg/kg (dry weight) or less.

(ii) The annual application of cadmium from solid waste does not exceed 0.5 kilograms per hectare (kg/ha) on land used for production of tobacco, leafy vegetables or root crops grown for human consumption. For other food-chain crops, the annual cadmium application rate does not exceed:

| Time period | Annual Cd application rate (kg/ha) |
|---|---|
| Present to June 30, 1984 | 2.0 |
| July 1, 1984 to Dec. 31, 1986 | 1.25 |
| Beginning Jan. 1, 1987 | 0.5 |

(iii) The cumulative application of cadmium from solid waste does not exceed the levels in either

paragraph (a)(1)(iii)(A) of this section or paragraph (a)(1)(iii)(B) of this section.

(A)

| Soil cation exchange capacity (meq/100g) | Maximum cumulative application (kg/ha) | |
|---|---|---|
| | Background soil pH less than 6.5 | Background soil pH more than 6.5 |
| Less than 5 | 5 | 5 |
| 5 to 15 | 5 | 10 |
| More than 15 | 5 | 20 |

(B) For soils with a background pH of less than 6.5, the cumulative cadmium application rate does not exceed the levels below: Provided, That the pH of the solid waste and soil mixture is adjusted to and maintained at 6.5 or greater whenever food-chain crops are grown.

| Soil cation exchange capacity (meq/100g) | Maximum cumulative application (kg/ha) |
|---|---|
| Less than 5 | 5 |
| 5 to 15 | 10 |
| More than 15 | 20 |

(2)(i) The only food-chain crop produced is animal feed.

(ii) The pH of the solid waste and soil mixture is 6.5 or greater at the time of solid waste application or at the time the corp is planted, whichever occurs later, and this pH level is maintained whenever food-chain crops are grown.

(iii) There is a facility operating plan which demonstrates how the animal feed will be distributed to preclude ingestion by humans. The facility operating plan describes the measures to be taken to safeguard against possible health hazards from cadmium entering the food chain, which may result from alternative land uses.

(iv) Future property owners are notified by a stipulation in the land record or property deed which states that the property has received solid waste at high cadmium application rates and that good-chain crops should not be grown, due to a possible health hazard.

(b) Polychlorinated Biphenyls (PCBs). Solid waste containing concentrations of PCBs equal to or greater than 10 mg/kg (dry weight) is incorporated into the soil when applied to land used for producing animal feed, including pasture crops for animals raised for milk. Incorporation of the solid waste into the soil is not required if it is assured that the PCB content is less than 0.2 mg/kg (actual weight) in animal feed or less than 1.5 mg/kg (fat basis) in milk.

(c) As use in this section:

(1) "Animal feed" means any crop grown for consumption by animals, such as pasture crops, forage, and grain.

(2) "Background soil pH" means the pH of the soil prior to the addition of substances that alter the hydrogen ion concentration.

(3) "Cation exchange capacity" means the sum of exchangeable cations a soil can absorb expressed in milliequivalents per 100 grams of soil as determined by sampling the soil to the depth of cultivation or solid waste placement, whichever is greater, and analyzing by the summation method for distinctly acid soils or the sodium acetate method for neutral, calcareous or saline soils ("Methods of Soil Analysis, Agronomy, Monograph

No. 9." C. A. Black, ed., American Society of Agronomy, Madison, Wisconsin, pp 891-901, 1965).

(4) "Food-chain crops" means tobacco, crops grown for human consumption, and animal feed for animals whose products are consumed by humans.

(5) "Incorporated into the soil" means the injection of solid waste beneath the surface of the soil or the mixing of solid waste with the surface soil.

(6) "Pasture crops" means crops such as legumes, grasses, grain stubble and stover which are consumed by animals while grazing.

(7) "pH" means the logarithm of the reciprocal of hydrogen ion concentration.

(8) "Root crops" means plants whose edible parts are grown below the surface of the soil.

(9) "Soil pH" is the value obtained by sampling the soil to the depth of cultivation or solid waste placement, whichever is greater, and analyzing by the electrometric method. ("Methods of Soil Analysis, Agronomy Monograph No. 9," C. A. Black, ed., American Society of Agronomy, Madison, Wisconsin, pp. 914-926, 1965.)

[44 FR 53460, Sept. 13, 1979, 44 FR 54708, Sept. 21, 1979]

**§ 257.3-6 Disease.**

(a) Disease Vectors. The facility or practice shall not exist or occur unless the on-site population of disease vectors is minimized through the periodic application of cover material or other techniques as appropriate so as to protect public health.

(b) Sewage sludge and septic tank pumpings (Interim Final). A facility or practice involving disposal of sewage

sludge or septic tank pumpings shall not exist or occur unless in compliance with paragraphs (b)(1), (2) or (3) of this section.

(1) Sewage sludge that is applied to the land surface or is incorporated into the soil is treated by a Process to Significantly Reduce Pathogens prior to application or incorporation. Public access to the facility is controlled for at least 12 months, and grazing by animals whose products are consumed by humans is prevented for a least one month. Processes to Significantly Reduce Pathogens are listed in Appendix II, Section A. (These provisions do not apply to sewage sludge disposed of by a trenching or burial operation.)

(2) Septic tank pumpings that are applied to the land surface or incorporated into the soil are treated by a Process to Significantly Reduce Pathogens (as listed in Appendix II, Section A), prior to application or incorporation, unless public access to the facility is controlled for at least 12 months and unless grazing by animals whose products are consumed by humans is prevented for at least one month. (These provisions do not apply to septic tank pumpings disposed of by a trenching or burial operation.)

(3) Sewage sludge or septic tank pumpings that are applied to the land surface or are incorporated into the soil are treated by a Process to Further Reduce Pathogens, prior to application or incorporation, if crops for direct human consumption are grown within 18 months subsequent to application or incorporation. Such treatment is not required if there is no contact between the solid waste and the edible portion of the crop; however, in this case the solid waste is treated by a Process to Significantly Reduce Pathogens, prior to application; public access to the facility is controlled for at least 12 months; and grazing by animals whose

products are consumed by humans is prevented for at least one month. If crops for direct human consumption are not grown within 18 months of application or incorporation, the requirements of paragraphs (b)(1) and (2) of this section apply. Processes to Further Reduce Pathogens are listed in Appendix II, Section B.

(c) As use in this section:

(1) "Crops for direct human consumption" means crops that are consumed by humans without processing to minimize pathogens prior to distribution to the consumer.

(2) "Disease vector" means rodents, flies, and mosquitoes capable of transmitting disease to humans.

(3) "Incorporated into the soil" means the injection of solid waste beneath the surface of the soil or the mixing of solid waste with the surface soil.

(4) "Periodic application of cover material" means the application and compaction of soil or other suitable material over disposed solid waste at the end of each operating day or at such frequencies and in such a manner as to reduce the risk of fire and to impede vectors access to the waste.

(5) "Trenching or burial operation" means the placement of sewage sludge or septic tank pumpings in a trench or other natural or man-made depression and the covering with soil or other suitable material at the end of each operating day such that the wastes do not migrate to the surface.

[44 FR 53460, Sept. 13, 1979; 44 FR 54708, Sept. 21, 1979]

### § 257.3-7 Air.

(a) The facility or practice shall not engage in open burning of residential, commercial, institutional or industrial solid waste. This requirement does not apply to infrequent burning of agricultural wastes in the field, silvicultural wastes for forest management purposes, land-clearing debris, diseased trees, debris from emergency clean-up operations, and ordnance.

(b) For purposes of Section 4004(a) of the Act, the facility shall not violate applicable requirements developed under a State Implementation Plan (SIP) approved or promulgated by the Administrator pursuant to Section 110 of the Clean Air Act, as amended.

(c) As used in this section "open burning" means the combustion of solid waste without (1) control of combustion air to maintain adequate temperature for efficient combustion, (2) containment of the combustion reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion, and (3) control of the emission of the combustion products.

[44 FR 53460, Sept. 13, 1979, 44 FR 54708, Sept. 21, 1979, as amended at 46 FR 47052, Sept. 23, 1981]

### § 257.3-8 Safety.

(a) Explosive gases. The concentration of explosive gases generated by the facility or practice shall not exceed:

(1) Twenty-five percent (25%) of the lower explosive limit for the gases in facility structures (excluding gas control or recovery system components); and

(2) The lower explosive limit for the gases at the property boundary.

(b) Fires. A facility or practice shall not pose a hazard to the safety of persons or property from fires. This may be accomplished through compliance with § 257.3-7 and through the periodic application of cover material or other techniques as appropriate.

(c) Bird hazards to aircraft. A facility or practice disposing of putrescible wastes that may attract birds and which occurs within 10,000 feet (3,048 meters) of any airport runway used by turbojet aircraft or within 5,000 feet (1,524 meters) of any airport runway used by only piston-type aircraft shall not pose a bird hazard to aircraft.

(d) Access. A facility or practice shall not allow uncontrolled public access so as to expose the public to potential health and safety hazards at the disposal site.

(e) As used in this section:

(1) "Airport" means public-use airport open to the public without prior permission and without restrictions within the physical capacities of available facilities.

(2) "Bird hazard" means an increase in the likelihood of bird/aircraft collisions that may cause damage to the aircraft or injury to its occupants.

(3) "Explosive gas" means methane ($CH_4$).

(4) "Facility structures" means any buildings and sheds or utility or drainage lines on the facility.

(5) "Lower explosive limit" means the lowest percent by volume of a mixture of explosive gases which will propagate a flame in air at 25°C and atmospheric pressure.

(6) "Periodic application of cover material" means the application and compaction of soil or other suitable material over disposed solid waste at the end of each operating day or at such frequencies and in such a manner

as to reduce the risk of fire and to impede disease vectors' access to the waste.

(7) "Putrescible wastes" means solid waste which contains organic matter capable of being decomposed by microorganisms and of such a character and proportion as to be capable of attracting or providing food for birds.

**§ 257.4 Effective date.**

These criteria become effective October 15, 1979.

**Appendix I**

The maximum contaminant levels promulgated herein are for use in determining whether solid waste disposal activities comply with the ground-water criteria (§257.3-4). Analytical methods for these contaminants may be found in 40 CFR Part 141 which should be consulted in its entirety.

1. Maximum contaminant levels for inorganic chemicals. The following are the maximum levels of inorganic chemicals other than fluoride:

| Contaminant | Level (milligrams per liter) |
|---|---|
| Arsenic | 0.05 |
| Barium | 1 |
| Cadmium | 0.010 |
| Chromium | 0.05 |
| Lead | 0.05 |
| Mercury | 0.002 |
| Nitrate (as N) | 10 |
| Selenium | 0.01 |
| Silver | 0.05 |

The maximum contaminant levels for fluoride are:

| Temperature[1] degrees Fahrenheit | Degrees Celsius | Level (milligrams per liter) |
|---|---|---|
| 53.7 and below | 12 and below | 2.4 |
| 53.8 to 58.3 | 12.1 to 14.6 | 2.2 |
| 58.4 to 63.8 | 14.7 to 17.6 | 2.0 |
| 63.9 to 70.6 | 17.7 to 21.4 | 1.8 |
| 70.7 to 79.2 | 21.5 to 26.2 | 1.6 |
| 79.3 to 90.5 | 26.3 to 32.5 | 1.4 |

[1] Annual average of the maximum daily air temperature.

2. Maximum contaminant levels for organic chemicals. The following are the maximum contaminant levels for organic chemicals:

| | Level (milligrams per liter) |
|---|---|
| (a) Chlorinated hydrocarbons: | |
| Endrin (1,2,3,4,10,10-Hexachloro- 6,7-epoxy-1,4,4a,5,6,7,8,8a-octahydro-1,4-endo, endo-5,8-dimethano naphthalene) | 0.0002 |
| Lindane (1,2,3,4,5,6-Hexachlorocyclo-hexane, gamma isomer | 0.004 |
| Methoxychlor (1,1,1-Trichloro-2,2-bis (p-methoxyphenyl) ethane) | 0.1 |
| Toxaphene ($C_{10}H_{10}Cl_8$-Technical chlorinated camphene, 67 to 69 percent chlorine) | 0.005 |
| (b) Chlorophenoxys: | |
| 2,4-D (2,4-Dichlorophenoxy-acetic acid) | 0.1 |
| 2,4,5-TP Silvex (2,4,5-Trichlorophen- oxy-propionic acid) | 0.01 |

3. Maximum microbiological contaminant levels. The maximum contaminant level for coliform bacteria from any one well is as follows:

(a) using the membrane filter technique:

(1) Four coliform bacteria per 100 milliliters if one sample is taken, or

(2) Four coliform bacteria per 100 milliliters in more than one sample of all the samples analyzed in one month.

(b) Using the five tube most probable number procedure, (the fermentation tube method) in accordance with the analytical recommendations set forth in "Standard Methods for Examination of Water and Waste Water", American Public Health Association, 13th Ed. pp. 662-688, and using a Standard sample, each portion being one fifth of the sample:

(1) If the standard portion is 10 milliliters, coliform in any five consecutive samples from a well shall not be present in three or more of the 25 portions, or

(2) If the standard portion is 100 milliliters, coliform in any five consecutive samples from a well shall not be present in five portions in any of five samples or in more than fifteen of the 25 portions.

4. Maximum contaminant levels for radium-226, radium-228, and gross alpha particle radioactivity. The following are the maximum contaminant levels for radium-226, radium-228, and gross alpha particle radioactivity:

(a) Combined radium-226 and radium-228 — 5 pCi/l;

(b) Gross alpha particle activity (including radium-226 but excluding radon and uranium)—15 pCi/l.

## Appendix II

### A. Process to Significantly Reduce Pathogens

Aerobic digestion: The process is conducted by agitating sludge with air or oxygen to maintain aerobic conditions at residence times ranging from 60 days at 15° C to 40 days at 20° C, with a volatile solids reduction of at least 38 percent.

Air Drying: Liquid sludge is allowed to drain and/or dry on under-drained sand beds, or paved or unpaved basins, in which the sludge is at a depth of nine inches. A minimum of three months is needed, two months of which temperatures average on a daily basis above 0° C.

Anaerobic digestion: The process is conducted in the absence of air at residence times ranging from 60 days at 20° C C to 15 days at 35° to 55° C, with a volatile solids reduction of at least 38 percent.

Composting: Using the within-vessel, static aerated pile or windrow composting methods, the solid waste is maintained at minimum operating conditions of 40° C for 5 days. For four hours during this period the temperature exceeds 55° C.

Lime Stabilization: Sufficient lime is added to produce a pH of 12 after 2 hours of contact.

Other methods: Other methods or operating conditions may be acceptable if pathogens and vector attraction of the waste (volatile solids) are reduced to an extent equivalent to the reduction achieved by any of the above methods.

**B. Processes to Further Reduce Pathogens**

Composting: Using the within-vessel composting method, the solid waste is maintained at operating conditions of 55° C or greater for three days. Using the static aerated pile composting method, the solid waste is maintained at operating conditions of 55° C or greater for three days. Using the windrow composting method, the solid waste attains a temperature of 55° C or greater for at least 15 days during the composting period. Also, during the high temperature period, there will be a minimum of five turnings of the windrow.

Heat drying: Dewatered sludge cake is dried by direct or indirect contact with hot gases, and moisture content is reduced to 10 percent or lower. Sludge particles reach temperatures well in excess of 80° C, or the wet bulb temperature of the gas stream in contact with the sludge at the point where it leaves the dryer is in excess of 80° C.

Heat treatment: Liquid sludge is heated to temperatures of 180° C for 30 minutes.

Thermophilic Aerobic Digestion: Liquid sludge is agitated with air or oxygen to maintain aerobic conditions at residence time of 10 days at 55-60° C, with a volatile solids reduction of at least 38 percent.

Other methods: Other methods or operating conditions may be acceptable if pathogens and vector attraction of the waste (volatile solids) are reduced to an extent equivalent to the reduction achieved by any of the above methods.

Any of the processes listed below, if added to the processes described in Section A above, further reduce pathogens. Because the processes listed below, on their own, do not reduce the attraction of disease vectors, they are only add-on in nature.

Beta ray irradiation: Sludge is irradiated with beta rays from an accelerator at dosages of at least 1.0 megarad at room temperature (ca. 20° C).

Gamma ray irradiation: Sludge is irradiated with gamma rays from certain isotopes, such as $^{60}$Cobalt and $^{137}$Cesium, at dosages of at least 1.0 megarad at room temperature (ca. 20° C).

Pasteurization: Sludge is maintained for at least 30 minutes at a minimum temperature of 70° C.

Other methods: Other methods or operating conditions may be acceptable if pathogens are reduced to an extent equivalent to the reduction achieved by any of the above add-on methods.

## PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, September 23, 1985, I served the within PETITION FOR WRIT OF CERT-IORARI in re: "County Sanitation District No. 2 of Los Angeles County vs. Los Angeles County Employees Association, Local 660, Service Employees International Union, AFL-CIO" in the United States Supreme Court, October Term, 1985, No..... on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

LEO GEFFNER, JEFFREY PAULE, GEFFNER & SATZMAN, Suite 900, 3055 Wilshire Blvd., Los Angeles, CA 90010;

and 1 copy on each of the following:

GEORGE AGNOST, City Attorney, PHILIP S. WARD, STEVEN A. DIAZ, Deputy City Attorneys Room 206, City Hall, San Francisco, CA 94102.

GLENN ROTHNER, ANTHONY R. SEGALL, REICH, ADELL & CROST, Suite 100, 501 Shatto Place, Los Angeles, CA 90020;

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RONALD A. ZUBRUM, ANTHONY T. CASO, PACIFIC LEGAL FOUNDATION, Suite 600, 455 Capitol Mall, Sacramento, CA 95814;

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on Septemner 23, 1985

at Los Angeles, California.

Kathleen Kastenbaum

## PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, September 23, 1985, I served the within PETITION FOR WRIT OF CERTIORARI in re: "County Sanitation District No. 2 of Los Angeles County vs. Los Angeles County Employees Association, Local 660, Service Employees International Union, AFL-CIO" in the United States Supreme Court, October Term, 1985, No. ..... on the persons interested in said action by placing 1 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows: continued:

FRED OKRAND, 633 South Shatto Place, Los Angeles, CA 90005;
CHARLES P. SCULLY, DONALD C. CARROLL, CHARLES P. SCULLY, II, 20th Floor, 220 Bush Street, San Francisco, CA 94104;
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H. JESS SENECAL, ESQ., JACK T. SWAFFORD, ESQ., BURRIS, LAGERLOF, SWIFT & SENECAL, Suite 2500, 3435 Wilshire Blvd., Los Angeles, CA 90010;

All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct
Executed on September 23, 1985
at Los Angeles, California.

Kathleen Kaltenbach

Supreme Court, U.S.
FILED
OCT 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-507

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1985

COUNTY SANITATION DISTRICT NO. 2
OF LOS ANGELES COUNTY
a public agency,
*Petitioner,*
VS.
LOS ANGELES COUNTY EMPLOYEES
ASSOCIATION, LOCAL 660,
SERVICE EMPLOYEES INTERNATIONAL
UNION, AFL-CIO, ET AL.,
*Respondents.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether Petitioner, County Sanitation District No. 2 of Los Angeles County, failed to raise the federal question before the California Supreme Court in a timely manner;

2. Whether the decision of the California Supreme Court in the instant matter rests upon adequate and independent state grounds;

Whether the California Supreme Court's decision in *County Sanitation District No. 2 of Los Angeles County vs. Los Angeles County Employees Association, Local 660,* granting sanitation district workers the right to strike, is repugnant and in conflict with the Federal Water Pollution Control Act and the Federal Resource Conservation and Recovery Act of 1976.

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No. 85-507

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1985

COUNTY SANITATION DISTRICT NO. 2
OF LOS ANGELES COUNTY
a public agency,
*Petitioner,*

VS.

LOS ANGELES COUNTY EMPLOYEES
ASSOCIATION, LOCAL 660,
SERVICE EMPLOYEES INTERNATIONAL
UNION, AFL-CIO, ET AL.,
*Respondents.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Los Angeles County Employees Association, Local 660, Service Employees International Union, AFL-CIO, Victor N. Hochee, Harry Gluck and Jack Roberts, oppose the Petition for Writ of Certiorari. Petitioner's request for this Court's review is not justified in that Petitioner failed to preserve the federal question below. Further, this Court should not grant review in that the decision of the California Supreme Court in this

matter rests on substantial and independent state grounds.

## OPINION AND JUDGMENT BELOW

The decision of the California Supreme Court is reported as *County Sanitation District No. 2 of Los Angeles County vs. Los Angeles County Employees' Association, Local 660* (1985), 38 Cal.3d 564, 214 Cal.Rptr. 424, 699 P.2d 835, and is reprinted in Petitioner's Brief as Appendix "A".

## JURISDICTION

Petitioner has improperly invoked this Court's jurisdiction under 28 U.S.C. § 1257(3). The California Supreme Court's decision in *County Sanitation District No. 2 of Los Angeles County vs. Los Angeles County Employees' Association, Local 660* (1985), 38 Cal.3d 564, rests on substantial and independent state grounds, and thus is not reviewable by this Court. Further, the federal question, through which Petitioner seeks to assert this Court's jurisdiction, was first raised below in a Petition for Rehearing to the California Supreme Court. (Petitioner's Petition for Rehearing is reprinted in its Brief as Appendix "F".) Thus, Petitioner did not preserve the federal question below in that Petitioner failed to raise the federal question in a timely manner.

## STATUTORY PROVISIONS INVOLVED

In addition to the statutes referred to in the Petition, Respondents would have this Court take notice of California Water Code §§ 13370, et seq., which Code sections implement the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376.

## STATEMENT OF THE CASE

Los Angeles County Employees Association, Local 660, Service Employees' International Union, AFL-CIO (hereafter referred to as "Union" or "Respondent") is the certified bargaining representative of the blue collar employees employed by the County Sanitation District (hereafter referred to as "District" or "Petitioner"). The District is a local public agency, and its labor relations are governed by the Meyers-Milias-Brown Act (hereafter referred to as "MMBA"), California Government Code §§ 3500, et seq. Pursuant to the provisions of the MMBA, the District and the Union negotiate on wages, benefits and other terms and conditions of employment, and if the parties reach agreement on these subjects of bargaining, the District and the Union enter into a binding collective bargaining agreement. See *Glendale City Employees Association vs. City of Glendale* (1975), 15 Cal.3d 328, 124 Cal.Rptr. 513, 540 P.2d 609, *cert. den.* 424 U.S. 943 (1976).

In early 1976, the District and the Union commenced negotiations for a new contract to become effective July 1, 1976. As of June 23, 1976, the major issues separating the parties involved the District's proposals for reduced overtime, salary increases, binding arbitration of grievances, and shower and change time. After rejecting the District's final offer, the employees voted on July 1, 1976 to strike the District. On July 5, 1976, the employees of the District commenced a strike which was in effect until July 16, 1976.

Commencing with the first day of the strike and continuing throughout the work stoppage, the District assigned all management and a substantial number of professional and supervisory employees to be physically stationed at most of the facilities of the District so that the District would be able to maintain plant operations throughout the

period of the strike. Pursuant to this arrangement, the District was successful in maintaining plant operations throughout the period of the work stoppage.

On July 6, 1976, the District filed a Complaint for Injunction and Damages. The District was granted a Temporary Restraining Order. The strike continued after the issuance of the Temporary Restraining Order. After the strike ended, the District proceeded with the prosecution of its damage claim in this action.

Following a bench trial, the Superior Court held that the strike was a public employee strike and was, therefore, unlawful, and that the Union was liable for damages. (Conclusion of Law No. 1 of the Superior Court's Findings of Fact and Conclusions of Law, reprinted as Appendix "C" in Petitioner's Brief.) Respondents appealed this judgment to the Court of Appeal of the State of California, asserting, *inter alia,* that strikes by public employees in California should no longer be considered unlawful under California common law. Petitioner opposed Respondent's appeal, arguing that strikes by public employees in California should continue to be construed as unlawful.[1]

In its Opinion, the California Court of Appeal upheld the liability of Respondents. However, while finding itself bound by the common law rule that denies public employees the right to strike, the Court of Appeal noted that recent decisions of the state Supreme Court had cast doubt on the continuing validity of this common law rule. *County Sanitation District No. 2 of Los Angeles County vs. Los Angeles County Employees Association, Local 660*

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[1]Respondents' Opening Brief in the Court of Appeal of the State of California is reprinted herein as Appendix "A". Petitioner's Brief to the Court of Appeal is reprinted herein as Appendix "B".

(1983), 147 Cal.App.3d 990, 995-997, 195 Cal.Rptr. 567 (withdrawn from publication).[2]

Respondents filed a Petition for Hearing with the California Supreme Court in November of 1983, seeking review of the Court of Appeal's decision. In their Petition for Hearing, Respondents argued, *inter alia,* that the California Supreme Court should overturn the California common law rule outlawing strikes by public sector employees.[3] Petitioner filed an Answer to the Petition for Hearing in December 1983, asserting that the common law rule on the illegality of public employee strikes should be maintained.[4]

The California Supreme Court granted a hearing in January 1984, and on May 13, 1985, the Court issued its decision.[5] The California Supreme Court reversed the Court of Appeal and held that, in the absence of a specific legislative prohibition, public employees in California have the right to strike unless the strike creates a "substantial and imminent threat" to the health or safety of the public.

On May 24, 1984, the District filed a Petition for Rehearing before the California Supreme Court raising, for the first time, the District's contention that strikes by District employees violate the Federal Water Pollution

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[2]The Court of Appeal's decision is reprinted as Appendix "B" in Petitioner's Brief.

[3]Respondents' Petition for Hearing in the Supreme Court of the State of California is reprinted herein as Appendix "C".

[4]Petitioner's Answer to Petition for Hearing in the California Supreme court is reprinted herein as Exhibit "D".

[5]The California Supreme Court's decision is reprinted as Appendix "A" in Petitioner's Brief.

Control Act and the Federal Resource Conservation and Recovery Act of 1976.[6]

On June 4, 1985, Respondents filed their Answer to Petition for Rehearing with the California Supreme Court, arguing, *inter alia,* that, pursuant to California practice and procedure, Petitioner had not raised the issue of the federal statutes in a timely manner.[7]

On June 27, 1985, the California Supreme Court denied the District's Petition for Rehearing.[8]

## REASONS FOR DENYING THE WRIT

### I

### THE FEDERAL QUESTION URGED BY PETITIONER WAS NOT PRESENTED TO THE COURT IN A TIMELY MANNER.

Petitioner challenges the decision of the California Supreme Court as being in substantial conflict with the Federal Water Pollution Control Act ("Pollution Control Act") and the Federal Resource Conservation and Recovery Act of 1976 ("Recovery Act"). However, Petitioner raised the applicability of the Pollution Control Act and the Recovery Act to strikes by sanitation workers for the first time in its Petition for Rehearing, filed with the California Supreme Court.

In order to obtain review of a state court decision in this Court pursuant to 28 U.S.C. § 1257, it must affirma-

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[6]Petitioner's Petition for Rehearing in the California Supreme Court is reprinted as Appendix "F" in Petitioner's Brief.

[7]Respondents' Answer to Petition for Rehearing in the California Supreme Court is reprinted herein as Appendix "E".

[8]The California Supreme Court's denial of the District's Petition for Rehearing is reprinted as Appendix "G" in Petitioner's Brief.

tively appear that a substantial federal question was presented to the state court in a timely fashion and was passed upon by that court. *Cardinale vs. Louisiana* (1969), 394 U.S. 437, 439, 89 S.Ct. 1161, 1163. Raising the federal question for the first time in a petition for rehearing addressed to the highest state court generally is insufficient to assert the jurisdiction of this Court unless the state court actually entertained the petition and expressly decided the question. *Hanson vs. Denckla* (1958), 357 U.S. 235, 243-244, 78 S.Ct. 1228, 1234; *Radio Station WOW, Inc. vs. Johnson* (1945), 326 U.S. 120, 128; 65 S.Ct. 1475, 1480. It is readily apparent from the California Supreme Court's denial of Petitioner's Petition for Rehearing that said court did not expressly consider the federal question which Petitioner now urges upon this Court. (See Appendix "G" to Petitioner's Brief.) Petitioner's failure to raise the federal question, which it now urges upon this Court, in a timely fashion below, constitutes a waiver of that issue for the purposes of review by this Court.

Petitioner cites *Brinkerhoff-Faris Trust Company vs. Hill* (1930), 281 U.S. 673, and *Missouri vs. Gehner* (1930), 281 U.S. 313, *disapproved on other grounds, United States vs. Atlas Life Insurance Company* (1964), 381 U.S. 233, for the proposition that a federal question may be raised for the first time in a petition for rehearing when the federal question is created by an unexpected decision of the state court which gave petitioner no prior opportunity to anticipate or assert the particular federal question. An examination of the facts of *Brinkerhoff-Faris* and *Missouri* shows, however, that this principle applies only in situations where the basis of the state court's decision had not been suggested nor litigated by any party to the litigation. This exception to the timeliness rule does not apply in the instant case.

Petitioner disingenuously asserts that it was surprised by the decision of the California Supreme Court. It is clear from a reading of all the Briefs filed in the California state courts that the legality of strikes by public employees was an issue litigated by the parties from the commencement of this action with the trial court and throughout the appellate process. Respondents urged to the state Court of Appeal and the state Supreme Court that the common law rule outlawing strikes by public employees in California should be changed. In fact, Respondents specifically argued for the standard which the California Supreme Court ultimately adopted in its decision. (See Respondents' Petition for Hearing filed with the California Supreme Court, Appendix "C" herein.) Moreover, Petitioner argued, in its Briefs before the state appellate court and the state Supreme Court, that the common law rule outlawing strikes by public sector employees should be maintained. (See Appendices "B" and "D" herein.)

It is clear that a litigant who raises a federal question for the first time in a petition for rehearing with a state's highest court can only preserve his right to review by this Court if the litigant can show that the decision of the state court was a surprise and could not have been reasonably anticipated from prior decisions. *Herndon vs. Georgia* (1935), 295 U.S. 441, 55 S.Ct. 794. There was no surprise in this case. Prior to the decision of the California Supreme Court in the instant case, the trend of the recent decisions of that court has been to carve out an ever-growing number of exceptions to the common law rule outlawing strikes by public employees. See *City and County of San Francisco vs. Cooper* (1975), 13 Cal.3d 898 (California Supreme Court held that a labor agreement resulting from a strike by public sector workers was valid and enforceable); *San Diego Teachers Association vs. Superior Court of San Diego* (1979), 24 Cal.3d 1 (legality of

public employees strikes was said to be an open question); *El Rancho Unified School District vs. National Education Association* (1983), 33 Cal.3d 946 (California Supreme Court divested superior courts of the jurisdiction to entertain a complaint for damages filed by a school district against a union which had led a strike of public school employees); *International Brotherhood of Electrical Workers vs. City of Gridley* (1983), 34 Cal.3d 191 (California Supreme Court held that it was unlawful for the City to terminate the certification of a union which had engaged in a strike involving public sector workers).

Indeed, the decision of the Court of Appeal in this matter, while upholding the trial court's award of damages, questioned the vitality of the common law rule outlawing strikes by public employees. (See the decision of the appellate court at pp. 4-7, reprinted in Petitioner's Brief as Appendix "B".)

Thus, the decision of the California Supreme Court was not unexpected and should have been anticipated by Petitioner, as this decision was clearly foreshadowed by prior recent decisions of that court, by the opinion of the state Court of Appeal, and by the litigants' Briefs to both appellate bodies. Accordingly, the cases of *Brinkerhoff-Faris Trust Company vs. Hill, supra,* and *Missouri vs. Gehner, supra,* are not applicable. Having failed to raise the federal question in a timely manner before the state court, Petitioner has, therefore, waived its right to review by this Court.

## II

## THE PETITION DOES NOT RAISE A REAL AND SUBSTANTIAL FEDERAL QUESTION.

The federal question urged by Petitioner is an abstract issue that does not affect the rights of the litigants in this proceeding. Petitioner argues in the hypothetical as to

how the decision of the California Supreme Court may, *in the future*, conflict with the Pollution Control Act and the Recovery Act. It is clear from the facts of the instant case that the District was able to maintain its facilities and operations throughout the strike, and thereby avoided the possibility of violating the Pollution Control Act and the Recovery Act. *County Sanitation District No. 2 of Los Angeles County vs. Los Angeles County Employees' Association, Local 660* (1985), 38 Cal.3d 564, 568. Accordingly, no actual case or controversy is present in the instant case.

Assuming, *arguendo*, that Petitioner had raised its federal question below in a timely manner, Petitioner must show that a decision on the federal question is necessary to this Court's disposition of the case. *Lear, Inc. vs. Adkins* (1969), 395 U.S. 653, 89 S.Ct. 1902; *Southwest Bell Telephone Company vs. Oklahoma* (1938), 303 U.S. 206, 212-213, 58 S.Ct. 528, 530. In order to secure the review of this Court, Petitioner must seek a declaration of rights as they stand, not on rights which may arise in the future, and there must be an actual controversy over an issue, not a desire for an abstract declaration of law. *In re Summers* (1945), 325 U.S. 561, 567, 65 S.Ct. 1307.

Petitioner can show no violation of the Pollution Control Act or the Recovery Act arising out of the strike by the District's employees in 1976. The District was able to maintain and operate its plants and facilities throughout the strike, Thus, the federal question raised by Petitioner does not arise from or have any application to the facts of this case. As the District was able to maintain plant operations by utilizing management personnel throughout the strike, there was no discharge of pollutants into the waterways, and, therefore, no violation of the Pollution Control Act. Similarly, as the District was able to operate

its landfills with management personnel, the possibility of a violation of the Recovery Act did not arise.

The federal question urged by Petitioner upon this Court is thus unnecessary to a determination of this case. It is improper for Petitioner to seek this Court's review of a hypothetical question which does not affect the rights of these litigants.

## III

## THE DECISION OF THE CALIFORNIA SUPREME COURT RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

It is well accepted that this Court will not review a decision of a state court resting upon adequate and independent state grounds. *Bell vs. Maryland* (1964), 378 U.S. 226, 84 S.Ct. 1814; *Smith vs. Smith* (1961), 366 U.S. 210, 81 S.Ct. 1050. Even if a judgment of a state court rests upon two grounds, one federal and the other non-federal, this Court is without jurisdiction to review the case if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Jankovich v. Indiana Toll Road Commission* (1965), 379 U.S. 487, 85 S.Ct. 493. The decision of the California Supreme Court in this matter to reverse its prior decision and legalize strikes by public employees within California rests firmly on independent and adequate state grounds.

### A. THE REGULATION OF LOCAL PUBLIC SECTOR LABOR RELATIONS IS A MATTER OF STATE CONCERN.

The National Labor Relations Act (29 U.S.C. §§ 151, et seq.) was enacted by Congress to regulate labor relations within the United States. The National Labor Relations Act ("NLRA") specifically excludes from NLRA coverage state governments and their political subdivisions.

(29 U.S.C. § 152(2).) In *Abood vs. Detroit Board of Education* (1977), 431 U.S. 209, 223, 79 S.Ct. 1782, 1793, this Court interpreted this exclusion as leaving the regulation of the labor relations of state and local governments to the state. *Accord, City of Saginaw vs. SEIU Local 446-M* (6th Cir. 1983), 720 F.2d 459, 462; *Local Union No. 370, etc. vs. Detrick* (9th Cir. 1979), 592 F.2d 1045, 1046; *Crilly vs. Southeastern Pennsylvania Transportation Authority* (3rd Cir. 1976), 529 F.2d 1359. Accordingly, the California Supreme Court's decision to legalize strikes by public employees was a proper exercise of that court's authority to regulate labor relations within the State of California.

In *Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen* (1960), 54 Cal.2d 684, the California Supreme Court stated *in dicta* that in the absence of specific legislative authorization, strikes by public employees were considered illegal. *Los Angeles Metropolitan Transit Authority* was decided at a time when public employees in the State of California did not generally have the right to organize collectively or to bargain over their terms of employment. In 1968, the California State Legislature passed the Meyers-Milias-Brown Act recognizing the right of public employees to organize and to bargain collectively. See California Government Code §§ 3500, et seq. On its face, the MMBA neither denied nor granted local governmental employees the right to strike. Over the years in California, the law of public sector labor relations has continued to develop. It was in the light of these ongoing changes that the California Supreme Court decided, in the instant matter, to exercise its authority to

change the state common law and make strikes by public sector employees legal.

It is well established in California that the California Supreme Court has the right to redefine, modify or even abolish a common law rule. *Rodriguez v. Bethlehem Steel* (1974), 12 Cal.3d 382, 394; *Green vs. Superior Court* (1974), 10 Cal.3d 616, 629. By legalizing strikes by public sector employees within the State of California, the California Supreme Court has exercised the power of the California courts to alter the California common law, coupled with the power of the state courts to regulate the labor relations of public employees within this state.

Accordingly, this court should deny Petitioner's request to review the California Supreme Court's decision in this matter, as that decision rests upon adequate and independent state grounds.

## B. PETITIONER'S RAISING OF A NEW ISSUE IN ITS PETITION FOR REHEARING WITH THE CALIFORNIA SUPREME COURT DOES NOT ACCORD WITH STATE PRACTICE.

The principle that this Court will not review state court judgments resting upon independent and adequate state grounds, even where those judgments also decide federal questions applies not only in cases involving state substantive grounds, but also in cases involving state procedural grounds. *Henry vs. Mississippi* (1965), 379 U.S. 443, 85 S.Ct. 364, *reh. den.* 380 U.S. 926, 85 S.Ct. 878. Thus, the failure to timely raise a federal issue in accordance with state practice can constitute a waiver of that point, which bars review by this Court. *Parker vs. North Carolina* (1970), 397 U.S. 790, 90 S.Ct. 1458.

It is the long-standing practice and procedure within California that the appellate courts will not grant a rehearing on points newly urged in a petition for rehear-

ing. It is the duty of counsel to see that all points are properly presented in the original briefs or argument, before submission. *People vs. Payne* (1977), 75 Cal.App.3d 601, 605; *City of Saratoga vs. Huff* (1972), 24 Cal.App.3d 978, 1006; *Smith vs. Crocker First National Bank* (1957), 152 Cal.App.2d 832, 836; *Esterbrook Company vs. Industrial Accident Commission* (1918), 177 Cal. 767, 771; *Prince vs. Hill* (1915), 170 Cal. 193, 195; *Andrews vs. Mokokelumne Hill Company* (1857), 7 Cal. 330, 333.

Relying on *Chambers vs. Mississippi* (1973), 410 U.S. 284, 290, n. 3, 93 S.Ct. 1038, and *Street vs. New York* (1969), 394 U.S. 576, 681-85, 89 S.Ct. 1354, Petitioner asserts that it is proper for this Court to review a state court's decision even if the state court has failed to articulate its denial of a federal claim raised by one of the litigants. (Pet., p. 14.) These cases, however, are inapplicable to the instant matter.

Both *Chambers* and *Street* were criminal cases involving issues of constitutional law. In *Chambers, supra,* the appellant raised as a defense his denial of due process as early as the trial court, claiming that a state evidentiary rule barring cross-examination of a witness in certain contexts denied him his due process. Appellant raised the same claim in a motion for a new trial and again on appeal to the state Supreme Court. In *Street, supra,* this Court found that the appellant had sufficiently raised a constitutional objection to a state statute during his trial and again before the state appellate courts, even though the state courts had failed to rule on this claim in their disposition of appellant's case.

In the instant case, Petitioner raised its federal claim for the first time in its Petition for Rehearing with the California Supreme Court. Both this Court and the California courts have long maintained that, absent extraordi-

nary circumstances, a claim raised for the first time in a petition for rehearing will not be reviewed. *Hanson vs. Denckla* (1958), 357 U.S. 235; *Esterbrook Company vs. Industrial Accident Commission* (1918), 177 Cal. 767, 771.

Petitioner has made no argument that the California Supreme Court, in denying a rehearing, applied this principle in an overly stringent manner in an attempt to bypass adjudicating the federal claim urged by Petitioner. Thus, Petitioner has not met its burden of affirmatively rebutting this Court's presumption that the state court's silence on the federal claim was due to Petitioner's failure to timely present this claim. See *Street vs. New York* (1969), 394 U.S. 576. Moreover, Petitioner has also failed to show that it was necessary for the state court to reach the federal claim in order to decide the case. *Southwest Bell Telephone Company vs. Oklahoma* (1938), 303 U.S. 206. Absent such an affirmative showing, this Court should decline to review Petitioner's claim.

## IV

## THE STANDARD ADOPTED BY THE CALIFORNIA SUPREME COURT IS NOT REPUGNANT NOR IN CONFLICT WITH THE FEDERAL STATUTES.

In its decision, the California Supreme Court declared that "strikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial imminent threat to the health or safety of the public." *County Sanitation District No. 2, supra,* 38 Cal.3d at p. 586. Contrary to Petitioner's assertions, this standard does not conflict with the Pollution Control Act or the Recovery Act.

It is the purpose of both the Pollution Control Act and the Recovery Act to regulate open landfills and the discharge of pollutants so as to protect the environment

and the health and safety of the public. 33 U.S.C. § 1251; 42 U.S.C. § 6902. The standard adopted by the California Supreme Court in legalizing strikes by public sector workers does not conflict with these purposes.[9]

The potential environmental catastrophes which Petitioner claims would result from public sector strikes fall squarely within the standard enunciated by the California Supreme Court in this matter. Such catastrophes would necessarily constitute a "substantial and imminent threat to the health or safety of the public," and such a strike could, therefore, be enjoined. The California Supreme Court noted in its decision that there was no showing by the District that the health and safety of the public was at any time threatened. The Court noted that had such a showing been made, the trial court would then have had the authority to declare such a strike illegal and to enjoin it. *County Sanitation District No. 2 of Los Angeles County vs. Los Angeles County Employees' Association, Local 660, supra,* 38 Cal.3d at p. 587, n. 35.

Additionally, Petitioner has made no showing that the decision of the California Supreme Court in this case has obstructed the remedial and enforcement mechanisms provided in the Pollution Control Act and the Recovery Act. The Pollution Control Act and the Recovery Act contain provisions for injunctions, fines and criminal penalties for those persons who violate sections of the Pollution Control Act and the Recovery Act. See, for example, 33 U.S.C. § 1319, and 42 U.S.C. § 6973. The decision of the California Supreme Court in this case does nothing to prevent either state or federal governments from exercising these remedial and enforcement powers.

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[9]It is interesting to note that Section 1321(e) of the Pollution Control Act, 33 U.S.C. § 1321(e), adopts basically the same standard for securing judicial relief against an actual or threatened discharge of hazardous substances into the nation's waterways.

These remedies have, in fact, been exercised by the state government in the context of a strike by public sector sanitation workers. In *State of California vs. City and County of San Francisco* (1979), 94 Cal.App.3d 522, both the employer and the union were subject to a substantial fine for violations of various provisions of the Pollution Control Act as implemented by the state Water Code. (California Water Code § 13370, *et seq.*) In that case, unlike the instant matter, the employer had decided not to run its facilities with management personnel during the strike by its employees. The shutdown of the sanitation facilities resulted in the discharge of pollutants into the waterways, which was the ultimate reason for the fine.

Lastly, there is nothing either in the Pollution Control Act or the Recovery Act to indicate a congressional intent to outlaw strikes by sanitation workers, be they public or private sector workers. Absent such a congressional intent, it is difficult to construe how the decision of the California Supreme Court conflicts with the Pollution Control Act or the Recovery Act. Accordingly, Petitioners have improperly sought review of the state court's decision in this matter.

## V

## CONCLUSION

For all the foregoing reasons, Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

DATED: October 24, 1985

Respectfully submitted,

LEO GEFFNER and
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By _____
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*International Union,*
*AFL-CIO, et al.*

# APPENDIX A

APPENDIX A

2ND CIVIL NO.

**66088**

# In the Court of Appeal

## SECOND APPELLATE DISTRICT

## State of California

COUNTY SANITATION DISTRICT NO. 2
OF LOS ANGELES COUNTY, a public agency,
*Plaintiff and Respondent,*

VS.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION,
LOCAL 660,
SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO;
VICTOR N. HOCHEE, HARRY GLUCK,
JACK ROBERTS, ANTHONY BUTKA, EUGENE MILLER,
GARY SCHALANDER, BILLY MANNING,
*Defendants and Appellants.*

**Appeal from the Superior Court of Los Angeles County.**
**Hon. Charles H. Older, Judge.**

**APPELLANT'S OPENING BRIEF.**

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IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

COUNTY SANITATION DISTRICT NO. 2
OF LOS ANGELES COUNTY, a public agency,
*Plaintiff and Respondent,*

*vs.*

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION,
LOCAL 660,
SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO;
VICTOR N. HOCHEE, HARRY GLUCK,
JACK ROBERTS, ANTHONY BUTKA, EUGENE MILLER,
GARY SCHALANDER, BILLY MANNING,
*Defendants and Appellants.*

## APPELLANTS' OPENING BRIEF.

## I.
## PRELIMINARY STATEMENT.

On July 5, 1976, the employees of the Respondent County Sanitation District No. 2 of Los Angeles County[1] commenced a strike.

The District filed a Complaint in the Superior Court on July 6, 1976, requesting injunctive relief in the First Cause of Action. (Clerk's Transcript pp. 1 and 32.)[2] The

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[1]The Plaintiff and Respondent in the action will be referred to as the "District". The Plaintiff and Respondent is the administrative District of the Los Angeles County Sanitation Districts, consisting of a number of Districts within Los Angeles County which are under a Joint Administration Agreement. (Exh. 120.) All administrative functions and labor relations have been delegated to District No. 2. Reporter's Transcript Vol. I, p. 9. (Hereinafter, any references to the Reporter's Transcript will be referred to as "Rep. Tr. Vol.", followed by the volume and page number.)

[2]All references to the Clerk's Transcript will hereinafter be designated as "Cl. Tr.", followed by the page number.

Superior Court issued a Temporary Restraining Order on July 6, 1976, restraining the strike. (Cl. Tr. p. 21.) The Complaint was filed against the Los Angeles County Employees Association, Local 660, Service Employees International Union, AFL-CIO[3] and seven employees of the Union. An Answer was filed to the Complaint alleging as an affirmative defense that the District had not engaged in good faith negotiations. (Cl. Tr. p. 142.) The District filed an Order to Show Cause Re Contempt on July 10, 1982, which the Superior Court set for hearing on July 27, 1976. (Cl. Tr. p. 87.)

The strike terminated on July 16, 1976. The District and the Union, sometime in the fall of 1976, entered into a stipulation that the strike was in effect on three separate days, and the Superior Court found only the Union in contempt and assessed a $1,500.00 fine.[4]

On June 12, 1979, the District filed an Amended Complaint amending the Second Cause of Action on the prayer for damages. (Cl. Tr. p. 147.) A trial was held before the Superior Court from March 18, 1981 and concluding on April 6, 1981. The Superior Court entered an Order of Intended Decision finding the Union and three employees, Hochee, Gluck and Roberts, liable and assessing compensatory damages in the amount of $246,904.00, with pre-judgment interest. (Cl. Tr. p. 426.) The Plaintiff filed Proposed Findings of Fact and Conclusions of Law. (Cl. Tr. p. 431.) The Defendants filed Objections to the Proposed Findings of Fact and Conclusions of Law and filed a Request for Special Findings.

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[3]Local 660 will hereinafter be referred to as "Union".

[4]The Clerk's Transcript does not contain the stipulation and the Order Re Contempt, as such documents have been misplaced. There is no dispute that there was such a stipulation and order, or that the Union paid the $1,500.00 fine.

(Cl. Tr. p. 443.) The Plaintiff filed a Response to the Objections and Request for Special Findings. (Cl. Tr. p. 460.) The Superior Court denied the Request for Special Findings. (Cl. Tr. p. 478.) The Superior Court signed the Findings of Fact and Conclusions of Law as submitted by the Plaintiff, without any changes, on August 13, 1981. (Cl. Tr. p. 479.) The Trial Court entered judgment against the Union and the three individuals in the amount of $246,904.00, plus $87,615.22 as pre-judgment interest from July 18, 1976 and $874.65 as costs, for the total amount of $335,393.87. (Cl. Tr. p. 488.) Judgment was entered. (Cl. Tr. p. 491.) The Union and the three individuals filed a Notice of Appeal from the Judgment. (Cl. Tr. p. 594.)

## II.

## SUMMARY OF FACTS.

The Union was certified by the District as the bargaining representative of the blue collar employees, consisting of approximately 500 employees of the District engaged in various classifications, such as Treatment Plant Operators, Sewer Maintenance Workers, and others.[5] In early 1976, the District and the Union commenced negotiations for a new Memorandum of Understanding to become effective July 1, 1976.[6] The bargaining revolved around

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[5]The various Memoranda of Understanding between the District and the Union set forth the classifications of employees, salary schedules, and other conditions of employment. (Exhs. 123, 355, 356, and 357.)

[6]The Union had originally been certified in three bargaining units, consisting of blue collar, technical and clerical. The technical unit was later disbanded. The Teamsters filed for decertification elections in the clerical and blue collar units, and became the certified bargaining representative in the clerical unit. However, the Union retained bargaining representation rights for the blue collar unit following an election in 1975.

many issues. As of June 23, 1976, the major issues separating the parties involved the District's proposal to reduce the amount of overtime, salary increases, binding arbitration of grievances, and shower and change time. (Rep. Tr. Vol. 1, pp. 141-173; Vol. 3, p. 579.) The employees voted on July 1, 1976 to strike after rejecting the District's final offer. (Rep. Tr. Vol. 3, p. 595.) The employees remained on strike until July 16, 1976 (Rep. Tr. Vol. 3, p. 595), and the employees returned to work on July 17, 1976 (Rep. Tr. Vol. 3, p. 606).

Commencing with the first day of the strike and continuing on through July 17, 1976, the District assigned all management and a substantial number of professional and supervisory employees to be physically stationed at most of the facilities of the District.[7] The District assigned the management, professional and executive employees of the District to the Upstream and Desert Treatment Plants, JWPCP, and the Long Beach and San Jose Plants on a 24 hour basis, with meals brought into the JWPCP. The landfills and maintenance yards were staffed on a 12 hour basis; however, South Gate Transfer Station was closed. The management, executive and professional employees[8] were paid time and one half for all

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[7]The facilities of the District, for purposes of assignment and discussion subsequently in this Brief regarding the payment of excessive overtime and unnecessary staffing, can be divided into seven groups: (1) the maintenance yards; (2) the South Gate Transfer Station; (3) the Upstream and Desert Treatment Plants; (4) the Joint Water Pollution Control Plant ("JWPCP"), Long Beach and San Jose Plants; (5) the landfills; (6) the laboratories; and (7) the joint administrative offices.

[8]Such employees are placed in a separate category from the blue collar or clerical employees regarding their salaries and methods of overtime payment under the Salary Resolution of District. Hereinafter, for the sake of convenience, such employees will be referred to as management employees.

hours over 40 hours per week, which included the time allotted for sleeping, eating, recreation, and driving to and from restaurants for meals. (Rep. Tr. Vol. 3, pp. 674-678; Vol. 4, pp. 832, 906, 908, 918, 923, 946-947.) The employees at the landfills, including the management employees, were assigned to a 12 hour shift with overtime paid at rate of time and one half, with a 10% bonus added to the hours.[9] (Rep. Tr. Vol. 4, pp. 972-987.)

The District is administered by Joint District 2, which consists of a Board of Directors that adopts the resolutions concerning the payment of salaries for all District employees. The Board of Directors of the District annually adopted a Salary Resolution covering all employees of the District, including the managment employees. Salary Resolutions were in effect on July 1, 1975 (Exh. 127) and July 1, 1976 (Exh. 130). The Salary Resolutions provide for overtime to management employees on the basis of a formula depending on the employees' salaries, where at a specified level the amount of overtime is equal to straight time. Unlike the blue collar and clerical employees, there is no provision for a time and one half payment of overtime over 40 hours for management employees. The Salary Resolution did not provide for a 10% bonus for any employees.

The order to pay time and a half payment to the management employees was given by Parkhurst, the Chief Engineer. (Rep. Tr. Vol. 2, pp. 517-523.) The 10% bonus for the employees working at the landfills was authorized by Frank Dair, who was in charge of the landfills. (Rep. Tr. Vol. 4, pp. 987-988.)

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[9]The 10% bonus was not added onto the overtime paid, but was added onto the number of hours, thereby increasing the amount of overtime.

The Board of Directors of the District met frequently in June, July and August, 1976. (Rep. Tr. Vol. 2, pp. 525-527; Exhs. 128, 129, 131, and 198.) The Board of Directors did not at any time approve or adopt any amendment to the Salary Resolution authorizing time and one half overtime payment to the management employees, or a 10% bonus to the employees working at the landfills during the strike.

The original Complaint filed on July 6, 1976 did not specify the amount of damages, but alleged compensatory damages in the amount of $27,000.00 a day and further damages by proof, and $4,000,000.00 punitive damages. (Cl. Tr. p. 132.)

On June 12, 1979, the District filed an Amended Complaint as to the Second Cause of Action, and alleged compensatory damages in the total amount of $430,841.40, specified as (a) paid overtime in the amount of $353,796.35, (b) compensatory overtime, $18,046.64, and (c) related costs at $48,998.41, together with punitive damages in the amount of $4,000,000.00. (Cl. Tr. p. 147.)

The Plaintiff's Pre-Trial Brief stated that the District was prepared to present evidence as to compensatory damages in the amount of $400,000.00, and alleged that there should be no offset on the strikers' salaries saved by the District and that the burden of proof on any offset was on the Defendants. (Cl. Tr. p. 274.) During the course of the trial, the Plaintiff submitted exhibits with an itemization of compensatory damages in the amount of $388,704.50 (Exh. 203.)

In the Answer to Interrogatories filed on October 28, 1978, the District answered that overtime paid was in the amount of $330,973.75.

Proof was offered at the trial regarding the amount of overtime for management employees in accordance with

the Salary Resolution. (Exh. 196.) There was a dispute as to the amount of overtime saved regarding the salaries of the strikers that were not paid during the course of the strike. (Exhs. 204 and 306.)

The Union offered exhibits regarding the amount of overtime that would have been reasonable on the basis of staffing at 8 hours, 12 hours, or 14 hours per day, rather than paying the management employees on a 24 hour basis, which included time for sleeping, eating, playing cards, and otherwise not working. (Exhs. 366, 367, 368, and 369.)

The District claimed damages at overtime at time and one half for management employees where the management employees were not paid but were credited with future time off. (Exh. 364.) The District offered specifics regarding additional damages referred to as lost productive time in the amount of $32,341.04, which was not admitted by the Trial Court. (Exh. 197.)

The Trial Court, in its Intended Decision (Cl. Tr. p. 426), assessed compensatory damages on the basis of time and one half overtime to the managment employees, but disallowed the 10% bonus to the landfill employees, for a total overtime amount of $375,347.00; and allowed an offset for saved salaries, FICA payments, retirement and overtime saved for the strikers in the amount of $134,443.00, with a deduction of $6,000.00 paid by the District for health premiums for the month of July, leaving a total offset in the amount of $128,443.00. The Trial Court also awarded pre-judgment interest in the amount of $87,615.00. (Cl. Tr. pp. 440, 448.)

## III.

## WHETHER A PUBLIC EMPLOYEES STRIKE PROVIDES A TORT CAUSE OF ACTION FOR DAMAGES IS AN UNRESOLVED ISSUE IN CALIFORNIA.

The Trial Court followed a number of decisions of the Court of Appeal that have held that public employees in California do not have the right to strike and that there is a cause of action for damages arising out of such a strike. *Pasadena Unified School District v. Pasadena Federation of Teachers,* 72 Cal.App.3d 108 (1977). Although the California Supreme Court denied a petition for hearing in the *Pasadena Unified School District* case, the question as to whether all public employee strikes are illegal was expressly left open in *San Diego Teachers Association v. Superior Court of San Diego,* 24 Cal.3d 1 (1979).[10]

The District's cause of action for damages is inconsistent with *City and County of San Francisco v. Cooper,* 13 Cal.3d 898 (1975), where the Supreme Court held that a strike settlement agreement between San Francisco and a union was valid and enforceable. The basic inconsistency between *Cooper* and *Pasadena* is that an agreement resulting from a strike is enforceable, and yet the public agency can then sue for damages arising out of the very same strike. In *Cooper,* San Francisco was coerced, by a strike of its employees, to increase its offer by many millions of

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[10]The Supreme Court vacated the trial court's injunction against a teachers strike on the basis of preemption where the primary jurisdiction belonged to the Public Employment Relations Board. Although the Teachers Unions argued that in the alternative, the common law should be based on a right to engage in a peaceful strike, the Supreme Court expressly declined to resolve such an issue. See specifically that dissent of Justice Richardson, where he criticizes the majority for leaving the issue open in view of the Supreme Court's prior refusal to grant a hearing in *Pasadena.*

dollars. Clearly, such an added increase in salaries constitutes damages to San Francisco, and under *Pasadena,* there would be a cause of action. How can San Francisco, on one hand, sue for such damages, and on the other hand, be held liable on the enforceable agreement for the increased salaries?

In *International Brotherhood of Electrical Workers v. City of Gridley,* 121 Cal.App.3d 169 (1981), the Court of Appeal held that a strike of city employees was illegal and that the City could discharge the employees and terminate the union's certification as the bargaining representative of such employees. The Supreme Court has granted a hearing."[11]

In *El Rancho Unified School District v. National Education Association,* 129 Cal.App.3d 177 (1982), the Court of Appeal in Division Three, Second Appellate District, held that the school district did not have a cause of action for injunctive relief based on the primary jurisdiction of the Public Employee Relations Board, but that the district did have a cause of action for damages, and stated:

> "If the well settled rule denying public employees the right to strike no longer represents the view of our Supreme Court, it is the province of that Court to say so. Its declination in *San Diego* to pass on the question adds nothing to its earlier decision similarly declining to resolve the question."

The Supreme Court has granted a hearing.[12]

There is a fundamental distinction between a right to obtain equitable injunctive relief restraining a strike, and obtaining damages against a union and employees of the union, as occurred in this case. See *City of Fairmont v.*

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[11]Oral argument was held on December 6, 1982.

[12]Oral argument was held on February 7, 1983.

*RWDSU,* 283 S.E.2d 589 (1980), where the West Virginia Appellate Court held there was no common law right to damages based on a public employees strike. See also *Lamphere Schools v. Lamphere Federation of Teachers,* 400 Mich. 104, 252 N.W.2d 1818 (1977), where the Michigan Court held that in the absence of specific legislation, there was no common law right to damages. The Michigan Supreme Court found a basic distinction between a right of injunctive relief concerning a strike that is against public policy, and the ingredients of a common law tort action, under the classic requirements of "duty", "breach of duty" and "monetary damages", constituting the triad of traditional tort law. The Michigan Supreme Court stated:

> "Furthermore, the ultimate legislative goal is to achieve a prompt, fair resolution of disputes while avoiding the disruption of the educational process. To recognize alternative tort remedies would result in a substantial negative impact upon such purposes. It would encourage the teachers' and school board's inaction. Eventual settlements could be prolonged pending the resolution of multiple tort claims and counterclaims. The inevitable result would be to create labor law logjams in our courts, and, at the same time, to exacerbate labor-management disputes."

**A. A Cause of Action for Damages Would Be Contrary to the Public Policy of California Under the Meyers-Milias-Brown Act (Government Code Sections 3500, *et al.*), Which Is to Encourage Resolutions of Disputes Between Public Agencies and Their Employees.**

Under *Cooper,* following a strike, San Francisco agreed to a settlement in the approximate additional amount of $4,000,000.00 for the fiscal year. Logically, under a cause of action for damages, the city could sue the union for the additional $4,000,000.00. It is difficult to reconcile the

validity of the contract calling for the increased salaries and still allow the city to sue for damages arising out of the strike. Therefore, the dispute would remain unsettled while the parties litigated in court.

As a matter of public policy, a cause of action for damages can only increase the difficulties in the resolution of the labor dispute. A union and employees in a strong economic position will remain on strike until the public agency agrees, as part of a settlement, to provide amnesty and a full release as to any damages.

The basis for a common law cause of action on damages involves itself with the concept of a "conspiracy", which has long been disregarded in California.[13]

To disallow a cause of action for damages would not displace the right of the District or any public agency to seek equitable relief, where there is an actual danger to the health and welfare of the community.

**B. The Cases Holding That the Common Law Prohibits a Public Employees Strike and Subjects the Union and the Employees to Damages Are Not Consistent With Modern Society, and the California Courts Have Consistently Modified or Drastically Changed the Common Law to Meet the Needs of Our Current Society.**

The Supreme Court, in *Muskopf v. Corning Hospital District,* 55 Cal.2d 211 (1961), changed the common law on sovereign immunity regarding lawsuits; and in *Li v. Yellow Cab Co.,* 13 Cal.3d 804 (1975), the Supreme Court

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[13]In *Pasadena,* the Court found a common law tort claim for damages based on the holding that there was a contract between the individual teacher and the school district which the union attempted to disrupt by a strike. In this case, there was no contract of employment between the employees and the District when the strike commenced.

changed the common law on contributory negligence in torts and applied a modern society concept of allowing damages on comparative negligence, and in *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal.3d 382 (1974), changed the common law on the right to sue for loss of consortium on a tort action. In *Rodriguez,* the Supreme Court stated that:

> "... whenever an old rule is found unsuited to present conditions or unsound it should be set aside and a rule declared which is in harmony with those conditions and meets the demands of justice...."

This case presents, apparently for the first time, a complete record regarding the nature and history of negotiations between the public agency and the union regarding the realities of public employee bargaining and strikes.[14] The blue collar employees were faced in the 1974 negotiations with the District demand to reduce a substantial number of employees from a 48 hour week to a 40 hour week, thereby resulting in a substantial net loss of take-home pay. After a short strike the matter was resolved, and there was a reduction to 44 hours rather than to 40 hours, with time and one half for overtime. In 1975, there was a further reduction, which resulted in an agreement where a substantial number of employees were reclassified and placed on a special rate.[15] In the 1976

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[14]It is estimated that there are over 1,000,000 public employees in the State of California, and in 1979 there were 79 strikes by public employees against the State and local governments, involving 39,076 employees, resulting in 602,408 idle man-days. In 1980, there were 46 public employee strikes in California, involving 20,045 employees, resulting in 160,474 idle man-days. (*California Public Employee Relations* No. 48, March, 1981.)

[15]Such rate is referred to as the "Y" rate, where the employee's salary is fixed at a higher rate than the classification salary in the agreement.

negotiations, the employees were faced with further loss of take-home pay. Further, the employees in the landfill (approximately 40% of the unit) did not receive any rest periods or any time for changes and shower time during the work day, whereas the other employees did receive such time, as well as a 15 minute rest break in the morning and in the afternoon. Also, the District proposed to remove the provision in the 1975 Agreement for binding arbitration of terminations and suspensions. On June 23, 1976, the District made a final offer of a general 4.5% increase and a 2.5% increase for Y rated employees, with no change in shower, change and rest time for the landfill employees. On July 1, the District made a new offer, consisting of a 5.1% increase and a 2.5% increase to the Y rated employees, with a total of 40 hours in the year of overtime to the employees who had their overtime eliminated. However, the District negotiator, Thompson, made this offer only on the condition that the employee negotiating committee recommend the settlement to the membership, and that if the offer was not recommended, then the only offer on the table was the June 23 offer of a 4.5% increase, unless the treatment plant operators gave up their change and shower time, and in such event the offer would be increased to 5.1%. The employee negotiating committee, consisting of rank and file employees, refused to make such a recommendation, and therefore presented the June 23 proposal to the membership, which rejected it by a secret ballot vote of 280 to 70, and the employees voted to go out on strike. (Rep. Tr. Vol. 3, pp. 565-595.)

The District's proposal of June 23 was the only proposal that could be presented to the membership by virtue of the District's position that the committee had to make a recommendation in favor of the second proposal of July 1. The result was that a number of the Y rated employees whose overtime hours would be reduced would end up with virtually no salary increase for the year, and to

aggravate the matter, many of such employees had received no salary increase or a minimal increase in 1975. (Exh. 354; see also Memoranda of Understanding, Exhs. 355, 356 and 357.) in 1975, a number of such employees actually took a substantial decrease in take-home pay, and by the District's proposal prior to the strike, many of such employees received as little as a $10.00 a month increase, and those who were Y rated and also on a 48 hour week would have received a loss in pay based on a 2.5% offer.[16]

The present state of confusing inconsistencies on the question of the common law right to strike should be changed to reflect the more enlightened view that fairness dictates that public employees should not be subjected to damages when they withhold their services.

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[16]For example, a Sewer Maintenance Worker (probably one of the most difficult jobs due to the inherent nature of the work) received $1,123.00 per month in 1973, $1,163.00 per month in 1974, and a drop to $1,113.00 per month in 1975. In 1976, based on a 5.1% increase, he would receive $1,128.00 per month (amounting to a $15.00 per month increase after losing $50.00 per month in 1975). For the period 1973-1976, he gained 1% in salary increases. The Court can take judicial notice that this was a period of substantial inflationary fluctuations in our economy. The question is, under the common law under such adverse conditions, does the Sewer Maintenance Worker, as a public employee, have to accept the District's final offer, which he considers to be unfair and unjust, or terminate his employment, or can he engage in a peaceful strike to gain further salary without subjecting himself, his family, his assets, and his Union to substantial damages as found by the Trial Court in this case? The principle on modifying or changing the common law should be applied. See *Butcher v. Superior Court of Orange County (Forte),* 139 Cal.App.3d 58 (1983). In addition, the Union's employees were held personally liable for performing their work, which brings back the outmoded theory of "conspiracy", which has no place in the modern common law.

**C. The District Did Not Engage in Fair Bargaining, and Therefore the Employees Had the Right to Engage in Economic Action in Order to Obtain a Reasonable Settlement.**

The District made an offer on June 23, then increased its offer on July 1, but only on the condition that the negotiating committee recommend the July 1 offer. Such tactics on the part of the District constituted an unfair labor practice and were not good faith bargaining, and violated the Meyers-Milias-Brown Act. In *Stationary Engineers v. San Juan Suburban Water District,* 90 Cal.App.3d 796 (1979), the majority of Justices, and particularly concurring Justice Reynoso, placed a strong emphasis on the public employer's bargaining tactics and whether the employer's conduct provoked the strike.

**D. The Claim for Damages for a Peaceful Public Employees Strike Will Deprive the Employees and the Union of Basic Constitutional Rights Under the California Constitution.**

The California Supreme Court has held on numerous occasions that some constitutional issues will be decided under the California Constitution independent of the United States Constitution. See *Committee to Defend Reproductive Rights v. Cory,* 29 Cal.3d 252 (1981).

The California Supreme Court has held that under the California Constitution, there are rights of association and equal protection under the law. The right to associate into a union and to peacefully withdraw services from a public employer constitutes a basic right of freedom of assembly and speech, and further, since private sector employees have the right to strike, such a deprivation deprives public employees of equal protection under the

law.[17] See *Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers,* 51 Cal.2d 766 (1964); *Bagley v. Washington Township Hospital District,* 64 Cal.2d 499 (1964); and *Robins v. Pruneyard Shopping Center,* 23 Cal.3d 899 (1977), affirmed 100 S.Ct. 2035 (1980).

## IV.

## THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING EXCESSIVE, UNREASONABLE AND UNLAWFUL COMPENSATORY DAMAGES.

### A. The Trial Court Committed Error in Allowing $18,046.54 as Compensatory Time Based on Time and a Half for Management Employees.

The Trial Court allowed $18,046.54 as compensatory overtime credited to employees based on time and one half.[18] Compensatory time off at time and one half was

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[17]There is no contention that the strike was other than peaceful. The Complaint and the Declarations requesting a Temporary Restraining Order and the Preliminary Injunction showed that there were pickets and that the Union was engaged in a strike, but nowhere was it alleged that there was any violence or blocking on ingress or egress, or that in any manner the strike was other than peaceful. (Cl. Tr. pp. 1, 13, 21, 32, 44, 55; see also Order to Show Cause Re Contempt, Cl. Tr. p. 87.) The testimony of District witnesses clearly established that the employees, including the management employees, came and went from the various facilities without any interference from the strikers, and that at a number of locations there was no picketing. A Temporary Restraining Order was issued and the Trial Court allowed damages as a "clean up" remedy on a violation of the injunction. There is no precedent or authority for such a unique damage remedy since there is a different purpose and burden of proof regarding a violation of an injunction. See *Stafford v. United Farm Workers,* 1 Cal.S.Ct., 1/27/83.

[18]The validity of paying time and one half versus straight time as set forth in the Salary Resolution will be discussed under a separate section of this Brief. If the District is required to follow the Salary

established at $15,615.40. The District's own Exhibit 194 established the value of compensatory hours earned at time and one half at $16,040.36.

Don Wahle, in charge of Payroll for the District, testified that there are no records kept by the District that establish in any way whether any of the employees actually took time off, and if so, in what amount. (Rep. Tr. Vol. 5, p. 1134.) Thompson testified that the District had no knowledge that the time was ever taken by any employees (Rep. Tr. Vol. 1, p. 249); that there was no compensation time policy and that there were no records kept as to whether any of the employees took time off, or whether there were any replacements; that there would not be any cost to the District if the employees who took time off were not replaced.[19] (Rep. Tr. Vol. 2, pp. 529-536); and that it was only on infrequent occasions that there are replacements, and without replacements there is no additional pay, and therefore there is no cost to the District if there are no replacements. (Rep. Tr. Vol. 5, p. 1242, referring to deposition of Thompson, p. 143, line 21.) The testimony is uncontradicted that there are no records and no evidence that any replacements were ever hired at any time for the employees who were credited with compensation time off, or that such compensation time was actually taken, and if so, in what amounts. In the absence of such evidence there is no showing of any loss to the District in

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Resolution, then the amount of compensation time based on the Salary Resolution would be $11,700.00 (Exh. 364; Rep. Tr. Vol. 3, p. 480.)

[19]In the deposition of Thompson, he testified:

> "Q. Right. But unless the District had to hire an extra person for a replacement, there would not be an additional labor cost to the District when a person takes comp time off; is that correct?
>
> A. That's true."

the amount of $16,040.36; this amount was improperly awarded by the Trial Court as compensatory damages.

**B. The Trial Court Committed Prejudicial Error in Allowing Compensatory Damages to Management Employees at Time and One Half When the Salary Resolution of the District Provided for Straight Time and the Board of Directors of the District Did Not at Any Time Amend the Salary Ordinance or Authorize the Payment of Time and One Half.**

The District, in its Amended Complaint filed on June 12, 1979 (Cl. Tr. p. 147), alleges that the District paid overtime in the amount of $363,796.35.

The District's Exhs. 194 and 203, prepared by an accountant of the District, show total overtime expense in the amount of $331,386.00. The Trial Court awarded overtime paid, excluding the 10% bonus for the landfills, in the amount of $375,347.00. However, the Trial Court apparently included the $55,080.00 as out-of-pocket expenses in this total amount. Although the Trial Court did not specify the basis of his calculations, it is clear that he awarded overtime, including compensatory time off and including FICA expenses, based on time and one half. The only amount that the District could pay on overtime under its Salary Resolution that would constitute a lawful expenditure would have been in the amount of $241,174.00 instead of $320,267.00.

There should be a reduction from the overtime assessed in the amount of $90,793.00. With this reduction only, the maximum judgment should be $156,111.00. (The amount of overtime legally allowed under the Salary Resolution less the amount of compensatory time erroneously included by the Trial Court, less the offsets.)

The testimony is uncontradicted that the authority for authorizing salaries for any District employees is exclu-

sively vested in the Board of Directors of the District. All District personnel, including Parkhurst, Wahle, and Thompson, were required to follow the Salary Resolution on salaries. (Rep. Tr. Vol. 5, p. 1125; testimony of Thompson, Rep. Tr. Vol. 2, pp. 541-542; deposition of Thompson, p. 114.) The Board of Directors has the exclusive authority to determine the amount of salaries paid to its employees. Specifically, Health and Safety Code Section 6481 provides that: "The Board is the governing power of the District, and exercises all District powers, except the making of an assessment roll in the first instance."

The Salary Resolution effective July 1, 1976 (Exh. 130), Section 5.1B, specifies the amount and the formula to be used in paying overtime to management:

> "If such employee's basis salary is $1,754.00 per month or more, the rate for compensation for overtime shall be the straight time rate."

The Salary Resolution, Section 5.1B, effective July 1, 1975 (Exh. 127), in Section 5.1B, contained the same provision as to straight time for overtime.

An employee earning less than the specified amount is paid on a formula. There was no provision in the Salary Resolutions effective July 1, 1975 or July 1, 1976 that authorized the payment of time and one half to the management employees. In fact, the Salary Resolutions in effect specifically set forth a formula and provide that for employees over a certain rate, the amount of compensation for overtime shall be straight time. In spite of the clear language of the Salary Resolution, the Trial Court awarded compensatory damages based on time and one half overtime paid to the management employees. Dair, in charge of the landfulls, testified that he was aware of the Salary Resolution regarding overtime, but he was instructed to tell the employees that they would be paid at

time and one half for time worked in excess of 40 hours although normally no overtime is paid to managerial employees. (Rep. Tr. Vol. 4, pp. 979-982.) Don Wahle, in charge of Payroll, testified that he knew that he was required to follow the Salary Resolution on overtime; that there was no authority in the Salary Resolution to pay the time and one half to the management employees; and that the Board of Directors had not given him such authority. However, he authorized the time and one half and had the checks issued based on instructions from Thompson and Parkhurst. Although he knew it was contrary to the Salary Resolutions, he followed orders. (Rep. Tr. Vol. 5, pp. 1125-1129.) Thompson, in charge of Personnel, testified that he was given an order by Parkhurst during the first week of the strike that all of the management employees were to receive time and one half. Thompson knew of the overtime provisions of the Salary Resolutions, and discussed the matter with Parkhurst. He then instructed Wahle upon the orders from Parkhurst. (Rep. Tr. Vol. 2, pp. 517-523.) There was no explanation as to why Parkhurst did not obtain such authority from the Board of Directors. Whether such an action paying retroactively for services already performed would have been legal is not in issue. The point is that the Board of Directors did not, at any time, adopt any resolution or amendment to the existing Salary Resolution to authorize time and one half overtime pay. In fact, the Board of Directors, on July 22, 1976, adopted the July 1, 1976 Salary Resolution containing the specific provision calling for straight time pay.

The Board was advised of the overtime, according to Thompson (Rep. Tr. Vol. 2, p. 525), and on the same day adopted the Salary Resolution of July 22, 1976 retroactive to July 1, 1976, which specifically provided for straight time pay on overtime for the management employees. The checks were issued on August 10, 1976. The

record is clear that the Board of Directors, as the exclusive authority as established by law to provide for salaries, did not take any action to approve the time and one half overtime, but on the contrary, took express action to provide for straight time pay only. Parkhurst was legally required to follow the Salary Resolutions, and any excess amounts paid were illegal.

In *Johnston v. Board of Supervisors of Marin County,* 31 Cal.2d 55 (1947), the Court held that: "When a Board of Supervisors acts in an administrative capacity, as in granting permits in a rezoning ordinance, it is bound by the terms of the ordinance until the ordinance is amended through proper legislative procedures."

In *Frates v. Burnett,* 9 Cal.App.3d 53 (1970), the Court held that: "Failure to follow the Civil Service procedures will result in an invalid discharge . . . and an administrative agency may not act in excess of its powers. *Any act so done is void.*" (Emphasis added.)

In *Martin v. Henderson,* 40 Cal.2d 583 (1953), the Supreme Court held that the State could not pay overtime demanded by two State Highway Patrol officers that was in excess of the authorizing statute providing for compensation. The Supreme Court stated:

> "That a person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of these duties, even though the salary may be a very inadequate remuneration for the services, nor does it alter the case that by subsequent statutes or ordinances his duties are increased, and not his salary."

In *Longshore v. County of Ventura,* 25 Cal.3d 14 (1979), the California Supreme Court stated:

> "In a similar vein, article XI, section 10, subdivision (a), added June 2, 1970, and applicable to local entities, provides: 'A local government body may not grant extra compensation or extra allowance to a public officer, [or] public employee . . . after service has been rendered . . . or pay a claim under an agreement made without authority of law.' Thus, where statutes or ordinances in effect when overtime hours were logged provided no right to compensation therefor, the public entity may not subsequently grant it."

The Supreme Court further stated as follows:

> "We have cautioned that 'The fact that normal hours of work are established and compensating time off is provided for work beyond those hours does not, of itself, give the employee a right to payment for overtime.' (*Martin v. Henderson, supra* . . . .) A lump sum payment for unused time may not be made 'in the absence of specific statutory authority.' "

The Supreme Court concluded after a certain period of time that the claimant was not entitled to overtime pay since the authorizing ordinance did not provide for such pay.

In *Van Riessen v. City of Santa Monica,* 63 Cal.App.3d 193 (1976), the Court denied a claim by firemen for unused sick leave which had not been authorized by the salary resolution. The Court specifically noted that the firemen had failed to show the existence of any provision, ordinance or resolution which would grant them the money for unused sick leave. The Court, at page 199, upheld the basic rule that was established by *Martin,* and stated . . .

> "A public employee is entitled only to such compensation as is expressly provided by statute or ordi-

> nance regardless of the extent of services actually rendered."

The Supreme Court, in the *Longshore* case, specifically referred to the California Constitution, Article IV, Section 17 (formerly Article IV, Section 32) and Article XI, Section 10(a), which provide that:

> "A local government body may not grant extra compensation or extra allowance to a public officer or public employee . . . after service has been rendered . . ., *or pay a claim under an agreement made without authority of law.*" (Emphasis added.)

Parkhurst, who acted on his own and without authority from the Board of Directors, was responsible for violating the District's own Salary Resolution. The law is clear that damages cannot be awarded based on a plaintiff's own violation of a law or statute. See *Page v. Bakersfield Uniform, etc.,* 239 Cal.App.2d 762 (1966). The Trial Court was in error when it allowed damages based on time and one half overtime when the District was in violation of its own Salary Resolution.

Dair, in charge of the landfills, testified that he personally authorized a 10% extra bonus on all overtime hours. (Rep. Tr. Vol. 4, p. 987.) Thompson testified that there was no authority under the Salary Resolution to allow the 10% bonus. (Rep. Tr. Vol. 1, pp. 206-208.) The Trial Court accepted the Union's arguments that the 10% was not authorized by the Salary Resolution and should not be included as compensatory damages. The 10% bonus is in exactly the same category as the time and one half overtime. If Dair did not have authority to pay the 10% bonus, then Parkhurst did not have the authority to pay time and one half overtime, as both items were not authorized by the Board of Directors and the Salary Resolution.

**C. The Trial Court Committed Prejudicial Error in Not Requiring Adequate Records and Verification as to Overtime Worked, and by Allowing Compensatory Damages on Overtime for Employees Who Either Did Not Work or Who Performed Work Unrelated to the Strike.**

The Trial Court did not exclude any amount of overtime that was paid to employees who did not work, nor did it exclude other items based on insufficient and inadequate records. The Trial Court committed error in not requiring a more detailed accounting with adequate records that would properly exclude a number of expenses that are not properly considered as compensatory damages. District Exhibits 194 and 196 set forth the amount of overtime expense at the time and one half rate and at the Salary Resolution rate, listing the amount of overtime paid to each individual. The amounts include the 10% bonus for the employees working in the landfills. However, the Trial Court excluded the 10% and set forth that the overtime paid, excluding the 10%, was $375,347.00. (Cl. Tr. p. 426.) In this amount, the Trial Judge apparently was including the $55,080.00 in claim out-of-pocket expenses and including the compensatory time off at $16,040.00 at time and one half. (See Exh. 203.)

An accountant, Carlene Tannere, testified that she prepared the exhibits showing the overtime paid at time and one half based only on special pay reports and the back-up sheets, and no further checks were made on whether the overtime was actually worked or not, nor were other records reviewed by her. (Rep. Tr. Vol. 2, pp. 448, 466.)

The only documents used by the accountant in obtaining the amount of overtime paid on landfills were introduced into evidence as: landfills, Exhibit 138; Compton Yard, Exhibit 137; San Gabriel Field Office,

Exhibit 136; the Upstream and Desert Treatment Plants, Exhibit 135; JWPCP, Exhibit 134; and laboratories, Exhibit 137.

The timekeeping records for JWPCP (Exh. 134) simply have the name of the employee and, with very few exceptions, indicate 24 hours per day.

Exhibit 135, for the Upstream and Desert Treatment Plants, shows the number of hours per day as 16 hours or 24 hours worked, with very few exceptions. The same is true of the other exhibits, simply noting written references that the employee claimed 24, 16 or 12 hours of work each day.

The records were inherently untrustworthy, as they were based on information given by employees who themselves had a personal interest in exaggerating the amount of overtime. The back-up sheets (Exhs. 134-139) were obtained by verbal information in the field. The special pay reports (Exh. 133) that were used by the accountant for the most part stated the number of hours in a weekly summary form as a total amount of hours, without specifying the days and hours worked per day. (Exhs. 169-174.) As a matter of self-interest, such records are inadequate to support compensatory damages. For example, in the back-up sheet for the laboratories (Exh. 139), the two management employees who completed the back-up sheets were Dwayne Fisher and James Lahner. Fisher credited 26½ hours overtime to himself, and Lahner credited 91 hours overtime, and obtained overtime pay in the amount of $1,632.00.

Art Bunnell, the supervisor who has lived in a trailer 24 hours a day at the Puente Hills landfill prior to and since the strike, credited himself with 78 hours of overtime. Deering, who recorded the overtime hours, credited himself with 60 hours of overtime. (Exh. 137.) Krever, who

recorded the maintenance overtime at the San Gabriel Yard (Exh. 136), credited himself with 88 hours of overtime and collected $2,172.00. Willie Mendoza, the timekeeper at the same location, gave himself 57 hours of overtime.

Wahle, who was in charge of Payroll, gave himself 36 hours of overtime. Merck, the check managment person at JWPCP, who kept the records of overtime and phoned them in to the timekeeper, gave himself 201½ hours of overtime and collected $4,975.00. Sheila Smith, a clerical employee who kept time records, credited herself with 16 hours of overtime. Nagel, a management employee at the Upstream and Desert Treatment Plants, gave himself 200 hours of overtime and collected $4,938.00. Van Huit, in charge of the landfills, gave himself 52½ hours of overtime, although he had worked many days of overtime prior to the strike and never received overtime pay. (Rep. Tr. Vol. 2, pp. 404-405.)

A review of the back-up sheets, special pay reports and the overtime paid (Exh. 194) shows the excessive amount of overtime that was received by the high-paid management employees. For a period from July 5 to July 17, some of these employees received extra pay exceeding $4,500.00. (Avakien, $4,071.00; Bohlier, $3,066.00; Byers, $3,318.00; Chen, $3,139.00; Ekman, $3,575.00; Fuller, $4,515.00; etc.)

The Trial Court allowed compensatory damages for overtime that was not properly incurred due to the strike. For example, at the South Gate Transfer Station, two employees, Flaker and Guerrero, were given an assignment to drive a truck on a research project to San Francisco. They were paid 57½ hours of overtime, which was included in the damage award. (Rep. Tr. Vol. 2, p. 399; Exh. 188.)

McCool testified that he was on strike on only the first day. He took off the Friday, Saturday and Sunday during the strike to attend car races at Barstow. The Trial Court allowed 19 hours of overtime for the days McCool was attending the car races. (Exh. 194.)

Another example is Art Bunnell, who worked and lived at the Puente Hills landfill. (Rep. Tr. Vol. 4, p. 974.) Bunnell kept the records of the employees at the Puente Hill landfill, and he gave himself 78 hours of overtime, although he lives in a trailer at the landfill.

Valerie Hall was credited with 25 hours of overtime. (Exh. 194.) Valerie Hall was Thompson's assistant, and she took notes during negotiations. The Trial Court included the overtime of Hall without any evidence as to why or what she did to claim 25 hours overtime when there were no negotiations and therefore no notes to take during the strike.

The Trial Court allowed damages for overtime of laboratory employees. (Exhs. 137 and 194.) There was no showing as to why laboratory employees were required to or did work overtime due to the strike. There was no strike or pickets at the laboratory, and all of the laboratory employees reported to work.

**1. The Maintenance Yards.**

Beeken assigned the employees, including management employees, to work on a 12 hour basis at each maintenance yard. There was no evidence provided by the District as to what such employees did during the additional 4 hours of overtime, as the regular schedule at the maintenance yards was 8 hours per day. The Trial Court included all of the overtime, consisting of 4 hours per day at time and one half, at the maintenance yards. Exhibits 350, 351 and 352 show the normal staffing and that the

number of employees assigned during the strike was excessive and unnecessary.

At the San Gabriel Maintenance Yard, there were normally 16 blue collar workers who worked 8 hours a day. Only one employee went out on strike for one day. However, the District paid overtime at the San Gabriel Maintenance Yard for 725 hours.

The witness who testified as to what actually occurred at the maintenance yard during the strike was Mark Christopherson. (Rep. Tr. Vol. 3, pp. 684-714.) Christopherson testifed that he worked the regular shift, from 7:00 a.m. to 3:30 p.m., at the Palmdale yard; there was normally no one present at the yard after 3:30 p.m. He worked the entire period during the strike, as did the entire crew. There were a few pickets for only 15 minutes on the first day of the strike. He was told by management to work 12 hours at the yard and then take 12 hours off. During the time he was there, he was instructed to report to work at noon and work until midnight, and that he would receive 4 hours overtime each day. During the entire 11 days of the strike, he left the Palmdale Maintenance Yard only once, to go to Lancaster to do some maintenance work for approximately 4 hours. He testified that for the balance of the time, along with the other employees at the maintenance yard, all he did was sit around, talk, and watch television, and that all of the other employees did exactly the same thing. He did spend 3 or 4 hours at a time constructing a sheet metal building, but he testified that the construction of the 9 × 7 foot building had nothing to do with the strike. Further, he and other employees barbecued, brought their girlfriends and families to the barbecues, and generaly had a social time.

Hawkins, the supervisor who told Christopherson to remain 12 hours, credited himself with 60 hours of over-

time. (Exh. 194.) Ferguson, another management employee, told Christopherson that if there was no work to do, he should "just hang loose". Ferguson credited himself with 60 hours of overtime.

The Union submitted Exhibit 352 for the Compton Maintenance Yard, where there are normally 60 blue collar employees. Three employees went out for two days, three employees for one day, and one employee for four days. Although there was almost a complete crew working at Compton during the strike, the District credited 3,723 hours of overtime at the Compton location.

The District paid each employee an additional $5.00 a day for a meal allowance, as they were assigned to be at the yards for 12 hours. The Trial Court allowed the $5.00 meal allowance, as it did the time and one half for the extra 4 hours. If the extra 4 hours per day was unnecessary and was unreasonable, then the $5.00 meal allowance should also be disallowed.

**2. The South Gate Transfer Station.**

Van Huit, the management person responsible for the South Gate Transfer Station, testified that the transfer station was closed down completely. Exhibit 343 shows that only a few of the blue collar employees normally assigned to South Gate went on strike. However, even though the South Gate Transfer Station was closed, the District assigned a number of construction employees to do work unrelated to the strike. The District paid, and the Trial Court granted, 128 hours of overtime for the work at the South Gate Transfer Station. In the initial claim during the trial, the District claimed overtime for Brian Stirrat on the basis of 65 hours of overtime. (Exh. 138.) However, the evidence established that Stirrat was assigned to oversee the construction project which had been planned long before the strike. The District then excluded

Stirrat's amount from the claim. However, the District claimed overtime paid to Jay Flake, who was paid for 41 hours, and A. Guerrero, for 52 hours of overtime (Exh. 194), although the testimony was uncontradicted that these two employees were given a special assignment of driving a truck and delivering materials to San Francisco on a research project that had nothing to do with the strike. (Rep. Tr. Vol. 2, p. 399.) The Trial Court gave full credit for this overtime.

### D. The Trial Court Committed Prejudicial Error in Awarding Overtime as Damages at the Upstream and Desert Treatment Plants.

The Lancaster, Pomona, Valencia, Saugus, Whittier Narrows, Los Coyotes, Palmdale and La Canada plants operated on the same system and schedule.[20]

The upstream plants operate on an eight hour shift, 7:00 a.m. to 3:30 p.m. seven days a week, with a crew varying from two to four treatment plant operators. There are usually one or two lab employees also assigned to the treatment plants. All of the personnel leave at 3:30 p.m. each day. Each plant is surrounded by a six foot gate with a padlock. After 3:30 p.m., the plants are on an ADT alarm system. (Rep. Tr. Vol. 2, pp. 915-923; Vol. 3, pp. 716-724; Vol. 4, pp. 840-847, 874-879.)

During the strike, Beeken assigned the non-striking blue collar employees to work 12 hours a day, with four hours overtime.[21] He also assigned two or more manage-

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[20]La Canada was in a different situation, as no employees were normally assigned to La Canada. One person would check La Canada for two or three hours per day, and there was a regular inspection by Cochran as the supervisor.

[21]Virtually all of the blue collar employees worked at the upstream plants during the strike.

ment personnel to each of the upstream plants on a 24 hour basis. The blue collar employees received a $5.00 meal allowance on the 12 hour shift. The management employees were given $11.00 per day based on the District's policy on per diem expenses. Cots were brought into the plants, and the management personnel slept at each of the plants. However, no meals were brought in, and they went out three times a day by driving to a restaurant, eating their meals, and returning to the plant. There was virtually no picketing at any of the plants except possibly for the first 15 minutes on the first day of the strike. The management people came and went whenever they wished to do so, and, in fact, they did leave at least three times a day in order to obtain their meals. There were few strikers and no problems during the strike; nor was there any emergency, and the plants operated in a normal manner. (Rep. Tr. Vol. 3, pp. 670-678; Vol. 4, pp. 916-929.)

Beeken testified that he did not visit the upstream plants during the strike, and therefore he could not testify as to what work was needed or performed at such locations. He merely stated a conclusion that because of the strike, he assigned management people to remain at the plants on a 24 hour basis for security reasons as well as to be present in case any problems developed.[22]

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[22]There was an inference by Beeken that the management persons were assigned on a 24 hour basis in case the blue collar employees who did not strike decided to leave their work during the course of the strike. Such an argument is without merit, as it cannot be assumed that an employee who decided not to go on strike would then, during the course of the strike, leave his work. Further, there is no evidence of this occurring; in fact, no employee who decided to work failed to show up during the strike. Also, on a normal schedule, there were no employees assigned after 3:30 p.m.

As to security, there is no explanation as to why the District did not simply hire one guard for each plant, as they did hire guards at the landfills and at the JWPCP. Further, the plants are in self-enclosed areas surrounded by padlocked six foot fences. Further, it is difficult to justify that there were legitimate security concerns when the management people slept, barbecued and entertained their girlfriends and families at the plants.

Regarding any possible breakdown of the equipment, the plants were on the ADT system as they had been for many years, and there was no reason why, if a problem developed, supervisory and management people would not be available. For example, Horace Cochran, a supervisor who was available, was never called during the strike. (Rep. Tr. Vol. 3, pp. 647-658.)

Cochran testified that he had been working for the District for over 26 years. In 1976 he was a supervisor of operations for the plants at Saugus, Valencia and La Canada. His normal duties were to visit all three plants, give assignments and check the work. He said that normally he puts in 10 to 12 hours per day, but has never claimed overtime pay. During the strike, he continued to work and performed his normal duties, working 10 to 12 hours per day, and he did not claim any overtime pay.[23] Cochran testified that after 3:30 p.m., there are no employees assigned to the plant and the plant is on a ADT system, and that he, himself, as a supervisor, would be called from time to time. He said that during the strike, he made daily trips to each of the three plants; that none of the treatment plant operators went out on strike at

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[23]Cochran's approach to his work and his responsibilities as a supervisor must be contrasted to the other management employees who, when given carte blanche, went into a virtual orgy of overtime and received huge amounts of money for the 11 day period, with the complete blessings of the District manager, Parkhurst.

Saugus; also, that the lab technicians worked during the strike; that maintenance was done in a normal manner; and that there was no difficulty in getting maintenance people to respond. He testified that treatment plant operators were given assignments to work longer than their regular shift, and as a supervisor, he did not know of any need for personnel to be assigned after 3:30 p.m. He visited Saugus, Valencia and La Canada, and there was never any trouble on coming and going.

He testified that he saw some management persons at the plant and he did not know what work there was for them to do. He did not observe any of the management people doing any work that was necessary, as the plants were fully manned by the regular blue collar employees. (Rep. Tr. Vol. 3, pp. 638-662.)

Gilbert Lechuga testified that he was assigned to the Palmdale plant prior to the strike. He normally worked eight hours a day, from 7:00 a.m. to 3:30 p.m. On a normal assignment, there were two treatment plant operators working with C. B. Price as the supervisor. On a special need, he was called possibly once or twice a month by the ADT alarm system. Normally, when one treatment plant operator was on vacation, the other treatment plant operator did the work by himself to cover the shift, along with the supervisor.

Lechuga, as a member of the Union, attended the Union meeting on July 1, 1976, but voted not to strike and did not participate in the strike. He reported to work and was assigned to work 12 hours, seven days a week. He observed one picket for 15 or 20 minutes the first day of the strike, and did not see any pickets for the balance of the strike.

During the strike, Lechuga testified that a management employee, Payne, was present 24 hours a day, and had a

cot, blankets and pillows. Lechuga said that during the strike he did his normal work, but did it in 12 instead of 8 hours; and that he could have done his work during his normal 8 hour shift.

He testified that Payne did not know anything about the plant and that during the entire period, Payne was reading books and would take walks around the plant. Payne also would talk to him at length about baseball and football. On one occasion, Payne attended a barbecue with the maintenance crew, accompanied by his girlfriend and her daughter. (Rep. Tr. Vol. 3, pp. 716-736.) See also the testimony of Mark Christopherson as to the non-work activities at Palmdale during the strike. (Rep. Tr. Vol. 3, pp. 684-714.)

Western testified that he was a treatment plant operator at the Pomona plant. He worked normally on a rotating basis with the foreman and one other treatment plant operator. On many days, the plant was manned by one person.

Western was a member of the Union and attended the meeting on July 1, but voted not to strike and did not participate in the strike. On the first day of the strike, one treatment plant operator was off for one day and then returned to work. There were no pickets at any time during the strike at Pomona. He worked his normal schedule and the overtime, and performed his regular duties.

He testified that three professional employees, Dr. C. Chen, Joe Haworth, and Keith Lewinger, were at the Pomona plant, two at a time, on the basis of 24 hours a day. C. Chen was an engineer, and Haworth and Lewinger were public relations personnel. He said that they slept at the plant and spent most of their time reading and engaging in social conversation. There was no work for

them to perform as the plant was fully manned by the regular blue collar employees. (Rep. Tr. Vol. 4, pp. 840-855.)

For sleeping, eating, reading, and social conversations, Chen received 145 hours of overtime and was paid $3,139.25; Haworth received 105 hours and was paid $2,294.90; and Lewinger received 126 hours and was paid $1,934.10. (Exh. 194.)

At the Valencia plant (Exh. 333), management employees accumulated 376½ hours.

At Palmdale, Payne read books, walked, and brought his girlfriend to the barbecue, and was given 81½ hours of overtime. (Exh. 194.) At Palmdale, there were two employees normally assigned, and none went on strike. (Exh. 334.) At Lancaster, there were two blue collar employees normally assigned, and none went on strike. However, the District allowed 477½ hours of overtime. (Exh. 335.)

At Saugus, there were four blue collar employees normally assigned, and none of the treatment plant operators went out on strike. However, at that facility, 777½ hours of overtime was credited. (Exh. 336.)

Exhibits 333-340 show the amount of overtime paid at the upstream and desert plants. There is no factual dispute that the District paid such amounts for management employees to sleep, read books, watch television, walk around, engage in conversations, attend barbecues with girlfriends, and to drive in and out of the plant three times a day and enjoy meals at a restaurant. The Trial Court allowed the full amount of time and one half to be included as damages.

Exhibit 368 sets forth the amount of savings, based on time and one half for overtime, if the District had followed reasonable assignments at the upstream plants.

There were very few employees on strike; there was virtually no picketing; and work was normal in every respect. The plants were on an alarm system after 3:30 p.m., and were enclosed by a six-foot gate which was padlocked. Any need for security could have been covered by one guard, and any problems during the course of the hours after 3:30 p.m. would have been handled through the alarm system. There was no work or need for extra persons to be assigned to sleep at the upstream plants. Instead, the District accumulated $87,269.66 of overtime expense at the upstream plants. The Union contends that this amount is unreasonable and should have been disallowed by the Trial Court. There was some overtime expense that was proper, such as for employees working on a sixth or seventh day (Saturday and Sunday), and for this amount of overtime the District would have incurred a cost of $7,687.34.

In the event such overtime is not completely disallowed, then at the most the District was justified in assigning the employees on a 12 hour day (which in fact it did for the blue collar employees who did not engage in the strike). The management employees could have been assigned to 12 hour shifts, and for the other 12 hours, they could have gone home, slept, and had their meals. There was no reasonable basis for the District to pay such persons for sleeping, reading, and not performing any work. Therefore, at a minimum, the amount of $56,388.02 must be deducted from the overtime claim (based on a 12 hour a day assignment). Exhibit 368 shows overtime on alternative reasonable assignments rather than 24 hours a day.

| | Savings based on time and one-half overtime |
|---|---|
| 10 hours a day assignment | $67,853.43 |
| 12 hours a day assignment | $56,388.02 |
| 14 hours a day assignment | $45,792.89 |

On the amount of overtime pay that should properly have been paid under the Salary Resolution, the amounts are less. (Exh. 369.) The total amount of the Salary Resolution expense at the upstream plants was $65,807.24. Again, only allowing for proper overtime on Saturday and Sunday, the amount of overtime should be disallowed by the amount of $60,259.72. However, the management employees should have been assigned at the most to a 12 hour day, allowing them to go home and sleep, have their meals and then return. On this basis, the District would have avoided paying $43,470.69.

The Union contends that at most, a 12 hour day would have been reasonable, but even giving the extreme benefit of the doubt to the District, it would be entirely without reason to pay overtime beyond a 14 hour day.

| | Savings based on Salary Resolution |
|---|---|
| 10 hours a day assignment | $51,753.87 |
| 12 hours a day assignment | $43,470.69 |
| 14 hours a day assignment | $35,897.90 |

In addition, at the upstream plants, since operations were almost completely normal, there was no justification to assign management employees to sleep on the premises and accumulate overtime on Saturday, July 17 and Sunday, July 18. The employees voted on July 16 to terminate the strike. Roberts called Thompson on July 16 and told him that the strike was over, and that the employees who were normally assigned to work on Saturday, July 17,

would report to work. (Rep. Tr. Vol. 3, pp. 595-606.) Even assuming there were problems in contacting the strikers, it made no practical difference at the upstream plants, since all of the employees were already working during the strike. Therefore, the District cannot justify overtime for Saturday and Sunday, July 17 and 18. The amount of overtime for the two days, based on time and one half, was $4,870.94, and based on the Salary Resolution, $3,337.62. (Exhs. 368 and 369.)

**E. The Trial Court Allowed Excessive Overtime Damages at the Joint Water Pollution Control Plant (JWPCP), Long Beach and San Jose Plants.**

The JWPCP and the two other plants with 24 hour operations present a different situation than the upstream and desert plants. At such plants, a substantial number of the blue collar employees did go out on strike.

The Union does not contend that the District did not have the right to assign management employees to operate JWPCP during the strike. The issue is whether it was reasonable to assign such personnel to remain on the premises 24 hours a day and to pay time and one half for sleeping, eating, reading, or in general, not performing any work.

Beeken gave, as the reasons for this unusual assignment, the security of the plant and the need to be available for work and any emergencies. For this reason, he allowed overtime for the employees when they slept, ate, played cards, and enjoyed other leisure activities. (Rep. Tr. Vol. 3, pp. 664-678.) Regarding security, it is difficult to understand how management personnel could further secure the plant, since the District expended over $10,000 for professional extra security at JWPCP. (Exh. 161.)

On the need to perform work, the evidence was that the plant operates on the basis of three rotating shifts of treatment plant operators, consisting of 12 to 15 per crew. On the day shift, there is an additional crew of 12 to 15 persons who fill in and engage in training and maintenance work. During the swing shift or second shift, there is one crew of 12 to 15 treatment plant operators and several custodians. There are no other employees at the plant during this second shift. The same situation exists on the third shift, except no custodian employees are present. The large support group, consisting of maintenance employees, including craftsmen such as plumbers and electricians, are all assigned to the day shift. (Rep. Tr. Vol. 3, pp. 783-796, 818-824; Vol. 4, pp. 956-958.)

Any problems regarding maintenance or malfunctions of equipment would have been handled by assigning or calling maintenance persons to JWPCP from the maintenance yards. In fact, all of the maintenance employees at the maintenance yards were sitting around barbecuing, watching TV and reading, and there was no reason why such persons could not have been assigned to JWPCP or at least have been on call.

The District did not have any supervisor or management person testify as to exactly what the management persons did at JWPCP during the 24 hours. The failure of the District to present any evidence as to what work was performed in the plant is a substantial failure to sustain their burden of proof for such excessive overtime damages at JWPCP.

On the second and third shifts (swing and graveyard), the District reasonably should have assigned 15 management persons that would have replaced the blue collar workers that were on strike. Instead, the District used 36 to 42 management persons during the second and third shifts. (Rep. Tr. Vol. 3, p. 676.)

There were no problems of coming and going, as Beeken testified that any person could leave JWPCP whenever he wanted to for personal reasons, and in fact many did leave and return. (Rep. Tr. Vol. 2, p. 344.) There was no record kept as to the hours the management people were gone, since the records show only 24 hours pay for each day of the strike.

The Union witnesses, who were long-time experienced treatment plant operators at JWPCP, Sullivan and City, testified that on the second and third shifts there was no work to be performed by anyone outside of the regular 12 to 15 treatment plant operating crew. (Rep. Tr. Vol. 3, pp. 786-796; Vol. 4, p. 956-958.) The adding of 15 to 20 management people to sit around and sleep provided no justifiable basis to pay them overtime. There simply was no work for them to perform.

There was no evidence of any unusual or abnormal conditions at JWPCP during the strike. The only evidence presented was that some debris was found on July 6 and again on July 16. However, City, who has been working at JWPCP for 15 years as a senior treatment plant operator, testified that it was normal to have debris come through the system, and that it was to be expected on a regular operating basis. There was no emergency if debris did come through, as most of the time it was cleaned up by the treatment plant operator crew, and if there was any substantial or heavy debris, then a crane operator would be called in to assist in removing the debris. He testified that a number of things come through the plant, such as rolls of wire, tires, etc., and that it was the responsibility of the treatment plant operators to remove the debris. (Rep. Tr. Vol. 3, pp. 955-958.)

The Union does not question that the District could have reasonably assigned management persons to work longer than eight hours at JWPCP. However, the Union

submits that a 24 hour pay period was not reasonable or justified. A reasonable basis on which to fully operate the plant was on 12 hour shift assignments. On this schedule, the management persons would have worked 12 hours, and for the other 12 hours they could have gone home. The District at JWPCP paid overtime at time and one-half in the amount of $129,824.26. (Exh. 367.)

The Union submits that 12 hours a day was more than reasonable. However, assuming that under extraordinary circumstances an employee could and did work 14 hours a day for 11 days, then the District acted unreasonably in not assigning the management employees to a 14 hour day.

Exhibits 366, 367, 368 and 369 set forth the amount of overtime that the Trial Court should have considered as reasonable, not the 24 hours that it allowed as damages. For example, the savings at JWPCP would have been as follows (Exhs. 366 and 367):

| Savings at: | 1½ time | Salary Resolution |
|---|---|---|
| 12 hours a day assignment | $87,145.03 | $61,545.42 |
| 14 hours a day assignment | $72,645.74 | $51,547.81 |

Since the strike ended on July 16, and even conceding there were problems of communications and the District did not know how many employees would return to work on Saturday, July 17, there was no basis for accumulating additional overtime on July 17. The testimony is clear that as of the evening of July 17, employees who were on strike had been notified, and those who were on the July 17 Saturday night shift did report to work. There was no reason to keep management employees at the plant for 24 hours on July 17. The savings on the overtime, based on time and one half, for Saturday, July 17 are $6,777.74, and on the Salary Resolution are $4,797.99.

There does not appear to be any authority in California on this unusual claim of the District that it can collect damages on payments to high-salaried management employees for sleeping, eating, playing cards, etc.

Witkin, *Torts,* Vol. 4, Section 870, at page 3158 — duty to use reasonable care and minimize the loss. *Valencia v. Shell Oil Co.,* 23 Cal.2d 840 (1944) — person bound to exercise reasonable care and diligence to avoid loss or minimize the resulting damages and cannot recover for losses which might have been prevented by reasonable efforts. See also *Steelduct v. Henger-Seltzer Co.,* 26 Cal.2d 634 (1945); *Kleinclaus v. Marin Realty,* 94 Cal.App.2d 733 (1949); *Sheffet v. Los Angeles County,* 3 Cal.App.3d 720 (1970).

In *A. A. Baxter Corp. v. Colt Industries, Inc.,* 10 Cal.App.3d 144 (1970), the Court of Appeal disapproved of a rate schedule "arbitrarily selected by plaintiff as the measure of its damages" (*id.,* at 155) and improperly used by the trial court as a measure of damages. The Court of Appeals, in reversing the Trial Court on damages, held at page 60:

> "Where there is more than one method of ascertaining damages, that method which is most definite and certain should be adopted. No one method is exclusive, where several exist, but that one should be chosen which best achieves the fundamental purpose of compensation to the injured person for his loss; and if the facts show that either of two measures of damages will fully compensate plaintiff for his loss, *that measure must be adopted which is less expensive to defendant."* (Emphasis added.)

The Court cited *Rivolich v. Raymond,* 20 Cal.App.2d 630, 644, and *Colvin v. John Powell and Co.,* 163 Neb. 122 [77 N.W.2d 900]; 25 C.J.S. Section 72, p. 842. The Court

refers to the "fully compensated" plaintiff. In this case, the District was compensated for damages which were not caused by the Union, damages which the District unlawfully helped itself to on the expectation that that Union could pay for this "windfall".

* * *

If the figure used by the trial court in determining damages cannot be supported under any reasonable interpretation of the record, a reviewing court may reverse or remand. See Cal.Jur.2d Damages Section 148, p. 290; *Benson Electric Co. v. Hale Bros. Assoc., Inc.,* 246 Cal.App.2d 686 (1966); and *Kitchel v. Acree,* 216 Cal.App.2d 119 (1963) (where the Court of Appeal remanded two items of damages to the trial court).

**F. The Trial Court Was in Error in Granting Damages for All Overtime at the Landfills.**

The Union does not contend that at some landfills it was unreasonable for the District to have non-striking blue collar employees or management employees report early and stay some extra time after closing. However, the District allocated overtime not based on one-half hour before the landfills normally opened, but assigned people to come in at least two hours before the landfills opened. Exhibits 194 and 196 do not specify the amount of overtime pay allocated to the landfills. The Union introduced evidence as to the amount of normal staffing and the unreasonable overtime paid at the landfills during the strike. (Exhs. 344, 345, 346, 347, 348, and 349.) At Calabasas, there were nine blue collar employees normally assigned to that landfill. McCool was on strike for several days, returned to work, and then went to Barstow to attend car races, and returned to work the following Monday. (Rep. Tr. Vol. 3, pp. 740-757.) A few of the other blue collar employees were off for one day, but by the

second or third day of the strike all of such employees were back to work. However, the District accumulated 365 hours of overtime at the Calabasas landfill, where conditions were almost completely normal. (Exh. 344.)

Johnson complained to McCool on numerous occasions that as a supervisor, he always reported to work at 7:30 a.m. and did not leave until after 5:00 p.m., but yet was not paid overtime. However, during the strike, when he worked almost the same hours that he worked normally, he was credited with 53½ hours of overtime. (Exh. 194.)

McCool, who was at the races in Barstow, was given 19 hours of overtime credit for such days. (Rep. Tr. Vol. 3, pp. 740-757; Exh. 194.)

Bonnell regularly lived at the Puente landfill and was normally there 24 hours of the day; he had never received overtime, but was given 78 hours of overtime during the strike. (Rep. Tr. Vol. 4, pp. 974-979; Exh. 194.)

Sharp lived in a trailer at Scholl Canyon landfill on a 24 hour basis, and did not receive overtime either before or after the strike. Sharp was assigned on a regular basis to live at the landfill on a 24-hour basis to act as a "watchdog." During the strike, Sharp received 72½ hours of overtime. (Rep. Tr. Vol. 4, pp. 993-996; Exh. 194.)

### G. The Trial Court Was in Error in Allowing the Overtime at Laboratories and Offices of the District Where No Strike Was in Effect.

There was no evidence as to why any laboratory or clerical employees were entitled to overtime. The overtime at the laboratories, where no strike existed and no striking employees were involved, should not have been allowed by the Trial Court at $6,309.97 for time and one half, or $4,252.24 under the Salary Resolution. (Exhs. 139, 194 and 196.)

There was no evidence why clerical employees should have received overtime. Wahle was the executive in charge of payroll, worked in the office, and gave himself 36 hours of overtime at time and one half. Hall, who was the secretary to Thompson and took notes during the negotiations, was given 25 hours of overtime. Since there were no negotiations during the strike, there is a total lack of evidence as to what work she performed and why the Trial Court allowed her overtime as part of the damage award.

## H. The Trial Court Was in Error in Allowing All the Items Claimed by the District as Strike-Related Without Requiring Proof of Reasonableness or Necessity.

The District introduced numerous bills and vouchers as "strike-related" expenses. (Exhs. 160 and 180). However, no evidence was presented on many of the items as to the causation between the strike and the expenses. Further, many of the following expenses were not reasonable or justified, but were still allowed by the Trial Court.

### 1. Meals at JWPCP.

The District catered meals to the employees who were on the premises 24 hours a day for 11 days. Such meal allowances were unnecessary, as based on a 12 or 14 hour day assignment, the employees could have gone home to eat at least one or two meals a day. However, even if such meals were proper, the District had a policy of paying management employees $11.00 per diem. At $11.00 per day, the cost of meals for the management employees at JWPCP, which is based on 40 persons for 11 days, would have amounted to $5,280.00. The District catered meals at a cost to the District of $9,105.00. Therefore, the difference of $3,825.00 should have been disallowed by the Trial Court.

**2. Meals at the Joint Administrative Offices.**

Exhibits 164-167 constituted the meal expenses at the Joint Administrative Office in the amount of $3,707.00. There was no evidence as to why any employees working in the administrative office, who were not on strike, were required to work overtime or if they did work overtime, and if so, for how many hours. Normally, the District does not provide meals to such employees. In view of the failure to produce evidence of reasonableness, justification or need, such meal payments should have been disallowed by the Trial Court.

**I. The Trial Court Committed Error in Granting Pre-Judgment Interest.**

The Trial Court awarded pre-judgment interest dated back to July 18, 1976.

The Union filed Objections to the Proposed Findings of Fact and Conclusions of Law as to the granting of pre-judgment interest in the amount of $87,615.22. The Objections were denied by the Trial Court. (Cl. Tr. p. 451.)

In order to be entitled to pre-judgment interest, the amount of damages must be certain or capable of being made certain by calculations, and must be subject to readily available standards such as market values. *Block v. Laboratory Procedures,* 8 Cal.App.3d 1042 (1970).

Pre-judgment interest is not allowable where the amount of damages is in dispute and depends upon a judicial determination based upon conflicting evidence without being ascertainable from the established market places or values. *Lineman v. Schmid,* 32 Cal.2d 204 (1948); *Leaf v. Phil Rauch, Inc.,* 47 Cal.App.3d 371 (1971).

In *Elliano v. Assurance Company of America,* 45 Cal.App.3d 170 (1975), pre-judgment interest was denied in an award for the market value of a damaged structure. The Court held that there was a dispute as to the measure of damages. The plaintiff and the defendant had each urged a different value and standard as to the amount of damages. The Court held that the amount depended upon the judicial determination, which was not ascertainable without a trial, and therefore pre-judgment interest was denied.

The law in California is that pre-judgment interest will be denied where there is a dispute as to the actual amount owed as well as to the liability. If the amount that is subject to damages is uncertain or cannot be determined by reference to well-established market values, pre-judgment interest will be denied. *Lineman v. Schmid, supra; Block v. Laboratory Procedures, supra;* and *Macumber v. State of California,* 250 Cal.App.2d 391 (1967).

Further, the law in California is that even where the amount of damages is of a nature that is certain or capable of being certain by calculation, there is still an obligation by the plaintiff to make the exact sum due to the defendant in order to justify pre-judgment interest. *Conderback, Inc. v. Standard Oil Company,* 239 Cal.App.2d 654 (1966). If a defendant does not know or cannot readily ascertain damages where they are uncertain, it is incumbent on the plaintiff to provide the defendant with a statement and supporting data from which the defendant could have made the necessary determinations. See *Conderback, supra,* at page 690. If a defendant does not know what amount was owed and could not ascertain it except by stipulation or by the judicial process, then the defendant is not liable for pre-judgment interest. *Levy-Zemper Company v. Southern Pacific Transportation Company,* 74 Cal.App.3d 762 (1977).

Where a party that may be liable for damages does not know what sum is owed and where damages can be arrived at only by a judicial determination based on conflicting evidence, then the damages are uncertain and there is no basis for an award for pre-judgment interest. See *Block, supra,* at pages 1046-1047.

There has been some confusion in California regarding pre-judgment interest under Civil Code Sections 3287 and 3288. Some courts have held that Section 3287 applies to contract actions, and that Section 3288 applies to tort actions or actions involving fraud, malice, etc. However, under Section 3287(a), where under appropriate circumstances, tort claims may provide the basis for pre-judgment interest, there still is a requirement of certainty. See *Levy-Zemper, supra.* The law is clear that under Sections 3287 and 3288, a plaintiff cannot recover pre-judgment interest as damages unless they are "certain or capable of being certain by calculation". In *Esgro Central, Inc. v. General Insurance Company of America,* 20 Cal.App.3d 1054 (1971), the Court stated that Section 3287(a) applies to situations:

> "where there is essentially no dispute between the parties concerning the basis of computation of damages if any are recoverable but where the dispute centers on the issue of liability giving rise to the damage."

The Court held that until the verdict and the damage trial was held, there was considerable "dispute between the parties concerning the basis of computation of damages". See page 1063.

In this case, the Trial Court did not specify whether it was awarding pre-judgment interest under Section 3287(a) or (b), or Section 3288.

The California Supreme has reviewed the law on pre-judgment interest in *Bullis v. Security Pacific National Bank,* 21 Cal.3d 801 (1978) and *Greater Westchester Homeowners Association v. City of Los Angeles,* 26 Cal.3d 86 (1979). In *Greater Westchester,* the Supreme Court held that pre-judgment interest on damages for mental and emotional injury and a nuisance action was improper. In denying pre-judgment interest, the Supreme Court explained *Bullis* and provided a test for determining whether pre-judgment interest is recoverable under Section 3288 on the basis that there must be certainty or that the damages were capable of being made certain by calculation.

Although in a limited type of tort action pre-judgment interest is allowed, there are still the basic requirements that the amount of damages must be certain or capable of calculation and not the subject of litigation between the parties. *Levy-Zemper,* applying such a basic rule of certainty or capability of being certain and not subject to judicial determination, is still the applicable law in California on pre-judgment interest.

In *E. L. White, Inc. v. City of Huntington Beach,* 138 Cal.App.3d 366 (1982), the Court cited *Levy-Zemper* as being the applicable law in California.

In *Southern Pacific Transportation Company v. State of California,* 115 Cal.App.3d 116 (1981), the Court held that an award of pre-judgment interest was invalid in a tort action as there was no finding of oppression, malice or fraud under Section 3288. A petition for hearing was denied on March 25, 1981. The Trial Court in this case made no finding of oppression, malice or fraud.

The trial established that there was substantial dispute as to the amount of damages. Further, the following items

show that not even the District knew the amount it was claiming until the end of the trial.

1. The Complaint for Damages was filed on July 6, 1976 and alleged compensatory damages in the amount of $27,000.00 a day for each day of the strike, and alleged that the amount of damages was not ascertainable at that time and that there would be further damages established by proof at trial. (Cl. Tr. pp. 1, 32.)

2. There was no demand or notice given to the Union regarding the amount of damages claimed until the filing of the Amended Complaint on June 12, 1979. (Cl. Tr. p. 147.) The Amended Complaint, in the Second Cause of Action, alleged total expenditures due to the strike over normal expenditures in the amount of $430,841.40. This amount was then broken into three separate divisions, consisting of: (a) paid overtime in the amount of $363,796.35; (b) compensatory overtime, $18,046.64; and (c) related costs in the amount of $48,999.41. The Amended Complaint also prayed for punitive damages in the amount of $4,000,000.00.

3. The District's Pre-Trial Brief stated that the District was prepared to present evidence as to compensatory damages in excess of $400,000.00, and further that there should be no offset from the damages on salaries saved that were not paid to the strikers, and that the burden of proof was on the Defendants regarding any offset on the salaries of strikers. (Cl. Tr. pp. 274, 305.)

4. During the trial, the District introduced Exhibit 203 as to itemization of damages, requesting damages in the amount of $388,704.00.

5. The amount of compensatory time off claimed by the District varied even during the trial. In Exhibit 203, the District claimed compensatory time off damages in the

amount of $16,040.00, whereas in Exhibit 364, the District claimed $15,615.40.

6. On overtime paid at time and one half, the District, in Exhibit 194, claimed a total expense in the amount of $331,386.00 and compensatory hours in the amount of $16,040.00.

7. The District disputed that there was any offset on overtime saved that would have been paid to strikers (Exh. 363), which was allowed by the Trial Court.

8. The strikers' salaries that were withheld was a matter in dispute. In Exhibit 204, the District showed the amount of salaries withheld as $112,649.00, whereas in Exhibit 306, it showed the amount of $118,793.46. The Trial Court allowed an offset in the amount of $112,649.00. (Cl. Tr. p. 426.)

9. The Union claimed as an offset the amount of retirement pay that would have been paid to strikers, which was disputed by the District. The Trial Court granted such offset in the amount of $8,312.00. (Cl. Tr. p. 426.)

10. The Union claimed as an offset the overtime saved in an amount of $8,992.00, which was disputed by the District and allowed by the Trial Court. (Cl. Tr. p. 426.)

11. The District, during the course of the trial, claimed additional damages as lost productive time in the amount of $32,341.04. (Exhibit 197.) The Trial Court excluded the exhibit as an item of damages. The District persisted throughout the trial in attempting to claim the additional damages of $32,341.04. (Rep. Tr. Vol. 3, p. 507.)

12. The District, during the course of the trial, reduced its claim for guard service since the original claim

included costs incurred after the strike had been terminated. (Exh. 180; Rep. Tr. Vol. 3, p. 487.)

13. The accountant for the District testified that the audit for the District on the amounts paid was not completed until a week before the trial. (Rep. Tr. Vol. 3, p. 487.)

14. The District made a motion to amend the Complaint to conform to Exhibit 203, to show the amount of damages claimed as well as the lost production time. The motion was granted to amend the Complaint to conform to Exhibit 203, and the Court denied the motion to allow damages on lost productive time. (Rep. Tr. Vol. 3, pp. 504-507.)

In addition to the above, which establishes clearly that there was no certainty as to damages and clearly no notice to the Union as to the amount of damages claimed to be certain or capable of being made certain by calculation, there are all of the items that are in dispute as set forth in this appeal.

The Union submits that under the applicable law in California, there was a substantial amount of uncertainty as to the amount of damages. which could only be resolved by a trier of fact and upon review for error by the Appellate Court. Further, the District itself did not know the amount of its claim, as it did not complete its audit until one week before the trial and in fact could not give the Union sufficient or reasonable notice as to the specific amount of damages claimed. In addition, the law is clear that since the Trial Court did not make a finding of malice, oppression or fraud, then pre-judgment interest in this tort action cannot be allowed. *Southern Pacific Transportation Company v. State of California, supra.*

## V.

## CONCLUSION.

For the reasons set forth in this Brief, the judgment should be vacated in its entirety.

In the event there is liability, the judgment should be reduced in amounts to allow only overtime under the Salary Resolution and to eliminate: (1) compensation time where no loss was shown; (2) unreasonable hours of overtime; (3) overtime where no work was performed due to the strike; and (4) unreasonable assignments of overtime beyond 12 or 14 hours a day. Specifically, the Appellants specified the proper summary of damages in their Post-Trial Brief. (Cl. Tr. pp. 421-424.) In the alternative, the case should be remanded to the Superior Court on damages in accordance with direction from this Court as to the proper amount of damages to be allowed.

Further, the award of pre-judgment interest should not be allowed.

DATED: March 28, 1983.

Respectfully submitted,

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# APPENDIX B

APPENDIX B

2ND CIVIL NO.

**66088**

# In the Court of Appeal

## SECOND APPELLATE DISTRICT

## State of California

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, a public agency,
*Plaintiff and Respondent,*

VS.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; VICTOR N. HOCHEE, HARRY GLUCK, JACK ROBERTS, ANTHONY BUTKA, EUGENE MILLER, GARY SCHALANDER, BILLY MANNING,

*Defendants and Appellants.*

**Appeal from the Superior Court of Los Angeles County.**
**Hon. Charles H. Older, Judge.**

**RESPONDENT'S BRIEF**

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IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, a public agency,
*Plaintiff and Respondent,*

vs.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; VICTOR N. HOCHEE, HARRY GLUCK, JACK ROBERTS, ANTHONY BUTKA, EUGENE MILLER, GARY SCHALANDER, BILLY MANNING,
*Defendants and Appellants.*

# RESPONDENT'S BRIEF

## I.

## PRELIMINARY STATEMENT.

Appellants Service Employees International Union, Local No. 660 ("Local 660"), Victor N. Hochee, Harry Gluck and Jack Roberts (jointly referred to hereinafter as "Appellants") appeal from a judgment entered in the Los Angeles County Superior Court in favor of Respondent County Sanitation District No. 2 of Los Angeles County. The judgment was predicated on a complaint for injunctive relief and damages filed on July 6, 1976 (and subsequently amended on June 12, 1979), in connection with Appellants' involvement in a labor strike against Respondent. (C.Tr. 1, 147)[1]

The strike, which was the subject of the complaint, began on July 5, 1976 and lasted until on or about July 16,

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[1]The Reporter's Transcript is hereinafter referred to as "(R.Tr. ____)." The Clerk's Transcript is referrred to as "(C.Tr. ____)." Trial Exhibits are referred to as "(Ex. ____)."

1976. On the same date the complaint was filed, a temporary restraining order was sought and obtained. Appellants' Brief at 1-2. Although the temporary restraining order prohibited Appellants from engaging in a strike, it was ignored. As a result of this failure to obey said order, Local 660 was adjudged guilty of contempt in October of 1976 and fined $1,500. Appellants' Brief at 1-2.

Inasmuch as the payment of the above-referenced fine did not in any manner serve to make Respondent whole for the harm suffered as a result of the strike, it proceeded with the prosecution of its action. On August 13, 1981, following a 12-day bench trial before the Honorable Charles H. Older, judgment was entered in the amount of $246,904.00, with interest thereon from July 18, 1976 in the sum of $87,615.22, and costs in the amount of $874.65. (C.Tr. 488)

## II.

## STATEMENT OF FACTS.

Los Angeles County Sanitation District No. 2 is one of 27 sanitation districts within Los Angeles County. Each such district is a separate and autonomous political subdivision of the State of California, authorized by *Health & Safety Code* § 6400 *et seq.* (West 1970 & Supp. 1983). (R.Tr. 11-13) Los Angeles County Sanitation District No. 2 is authorized by a joint powers agreement (Ex. 120; *see Gov't Code* § 6500 *et seq.* (West 1980 & Supp. 1983)), to act on behalf of itself and the 26 other districts, in numerous matters, including personnel and labor relations. (These 27 sanitation districts are hereinafter jointly referred to as "the District").

The District operates sanitary landfills for the disposal of rubbish, sewage treatment plants and approximately 11,000 miles of sewer trunk lines. (R.Tr. 11-12, 260) The landfills in use in 1976 included the Palos Verdes, Puente

Hills, Mission Canyon, Scholl Canyon, Spadra and Calabasas facilities, which together received about 15,000 tons of refuse each day. (R.Tr. 350) The 11 sewage treatment plants, which include the Long Beach, Los Coyotes, Whittier Narrows, San Jose Creek, Pomona, Saugus, Valencia, Palmdale, Lancaster and La Canada water renovation plants, were processing 450 million gallons of raw sewage each day. (R.Tr. 261; Ex. 102 through Ex. 119) Most of these plants are upstream "feeders" to the Joint Water Pollution Control Plant ("JWPCP") located in Carson.[2] (R.Tr. 261) In maintaining these operations, the District served approximately four million County residents. (R.Tr. 12)

The District's labor relations are governed by the Meyers-Milias-Brown Act, *Gov't Code* §§ 3500-3511 (West 1980 & Supp. 1983), and its Employee Relations Resolution (Ex. 122), as authorized under that Act. Local 660 is a labor organization affiliated with the Service Employees International Union, AFL-CIO, which has represented the District's blue-collar employees since 1973. At all times pertinent hereto Victor N. Hochee was the general manager of Local 660 (R.Tr. 23, 421), Harry Gluck was Local 660's manager of representational services (R.Tr. 618, 622), and Jack Roberts was one of its field business representatives. (R.Tr. 412)

The District and Local 660 have bargained concerning the wages, hours and working conditions of the District's blue-collar employees, under the Meyers-Milias-Brown Act, since 1973. (R.Tr. 24-25) Each year[3] these

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[2]The District maintained other facilities, such as maintenance yards in Palmdale, Compton and San Gabriel, the South Gate Transfer Station and 46 pumping stations, as well as a Joint Administrative Office ("JAO"). (R.Tr 260-62)

[3]Prior to 1977, MOUs were one year in duration.

negotiations resulted in a binding labor contract, or Memorandum of Understanding ("MOU"), *See Glendale City Employees Ass'n v. City of Glendale,* 15 Cal. 3d 328, 124 Cal. Rptr. 513, 540 P.2d 609 (1975), *cert. denied,* 424 U.S. 943 (1976).

Local 660 has struck in support of its collective bargaining demands on two occasions. In June 1974, Local 660 engaged in a five-day strike, supported by virtually all the District's blue-collar employees. (R.Tr. 711, 936) The District responded to the strike by filing a legal action not unlike that which is the basis of this proceeding and by obtaining a restraining order. (Los Angeles Superior Court Case No. C-92480) In spite of the existence of the restraining order, the strike continued for several days following its issuance. The matter, however, was not pursued in court in that the action was dismissed as part of a strike settlement. (R.Tr. 25, 570)

Local 660's second strike, the subject of this lawsuit, lasted from July 5 through July 16, 1976. (R.Tr. 419-20) Despite approximately 19 negotiation meetings over a 3½ month period prior to the strike, and the District's comprehensive, compromise proposals on June 23 and July 1, 1976, the parties were unable to reach agreement on the terms of a new MOU. (R.Tr. 29) On the evening of July 1, 1976, Local 660's membership rejected the District's last offer and voted to strike. (R.Tr. 590-95) The work stoppage did not begin, however, until 10:00 p.m., Monday, July 5, so employees could receive holiday pay for that day.[4]

It is clear that Local 660 prepared for the 1976 strike well in advance of July 5, 1976. Such preparations included the hiring of a media consultant; the purchase of

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[4]As July 4 fell on a Sunday in 1976, the following Monday was observed as a paid holiday. (R.Tr. 240, 967-68)

newspaper ads; the preparation, stockpiling and distribution of picket signs; the written request to the Service Employees International Union and the Los Angeles County Federation of Labor for strike sanctions; the printing of brochures; the renting and equipping of local strike headquarters; the appointment of picket "captains"; the preparation of "hot-line" telephone messages,[5] and other strike-related activities. (R.Tr. 35-36, 420, 423-26, 598, 617; Exs. 126, 184, 187, 191, 192; C.Tr. 138-40, 158, 209-14)

In order to keep critical facilities operating, the District also prepared for the strike prior to July 5, 1976. Roger Beeken, the engineer in charge of the District's sewerage department, prepared a written "strike-contingency" plan (Ex. 145) to insure continued operation of the sewerage treatment plants. This comprehensive plan provided for 24-hour assignment of the 42 available management personnel to specific locations and duties for the duration of the strike. (Ex. 145) It also set forth the overtime policy for the strike, provided for added security personnel and delineated arrangements for food and sleeping accommodations. (Ex. 145) The plan was specifically designed to rectify deficiencies in the District's response to the 1974 strike, in assuring tighter plant security and a more orderly transition to management operation. (R.Tr. 257-58; Ex. 145)

Similarly, in anticipation of the strike tentative arrangements were made to staff the landfills with available management and professional employees. (R.Tr. 355, 358, 972) Moreover, due to the fact that the District's landfills had been vandalized during the 1974 strike, arrangements

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[5]Local 660's "hot-line" consisted of pre-recorded telephone messages concerning the strike and negotiations. (*See* R.Tr. 420-21; Ex. 191; C.Tr. 167-72)

were made to upgrade security at the various sites. (R.Tr. 358, 367) In all respects, the District's primary objective was to maintain operations at the sewage treatment plants and landfills (R.Tr. 356)

The strikers' objective was precisely the opposite. Even before the strike began, employees attempted to sabotage vital equipment at the JWPCP, the District's main sewage treatment plant. Management personnel replacing blue-collar employees shortly after 10:00 p.m. on July 5, discovered a sewage discharge line blocked with a plywood disc. Plant vehicles, their keys hidden in the hubcaps, were found blocking the entrance to the standby generator building. (Ex. 157) The battery cables to the standby generator had been cut. (Exs. 157, 175, 176).

On July 6, 1976, management discovered a particularly dangerous condition in the large, sewage "digestion" tanks at the JWPCP. For two or three days prior to the strike, employees had deliberately overfed the anaerobic bacteria in these tanks with sewage. This overfeeding caused a serious decrease in bacterial production of methane gas, which is used to power effluent pumps and other critical equipment at the JWPCP. The effluent pumps are necessary to prevent inflowing sewage from flooding the JWPCP in a manner that would severely incapacitate and damage the plant. Had these sabotage attempts not been uncovered, a disruption in the primary source of power in combination with the incapacitation of standby generators could have crippled a facility whose operation is critical to the health and safety of the community. (R.Tr. 330-34; Ex. 157)

Efforts to shut down District facilities did not cease after the strike began, On July 6, 1976, approximately 75% of the District's 500 blue-collar employees failed to report to work. (R.Tr. 40, 157; C.Tr. 135) Moreover, on the morning of the 6th, picketing commenced at virtually

all the District's treatment plants, landfills and other facilities. (R.Tr. 383, 833, 948; C.Tr. 136, 158-59, 183, 221) The pickets distributed leaflets and attempted to dissuade customers from using District facilities. (Exs. 183, 185; C.Tr. 158-59, 162-66) Entrances to District work sites were routinely strewn with roofing nails and broken glass; fences, gates and vehicles were damaged. (R.Tr. 325-30; Ex. 157)

Further, significant amounts of debris[6] were introduced into the sewer system immediately upstream from the JWPCP. Unless such debris is quickly removed from the mechanical rakes and screens, which prevent such flotsam from entering the JWPCP, the effluent flow would be dammed, and the rakes damaged. (R.Tr. 262, 327-29) During the strike, this debris caused precisely such damage. *Id.*

Despite acts of sabotage and picket line problems, District operations were not significantly impaired and as it became apparent that the District would not capitulate to strike pressures, a few employees began drifting back to work.[7] During the second week of the strike, discussions resumed and by Friday, July 16, 1976, the parties reached a tentative agreement on a new MOU, the terms of which were the same as the District's July 1 offer. (*See* Exs. 182, 335; R.Tr. 629) On the evening of July 16, 1976, Local 660 held a meeting at which the membership voted to accept the District's offer. (R.Tr. 1059-60) There has

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[6]Items retrieved from the inflowing sewer system included a mattress, tires, a canvas tarpaulin, upholstered cushions, carpeting and cabinet doors. (R.Tr. 328-29; Ex. 157, 158, 159) Such articles do not normally come down the sewer system, and never in such quantity. (R.Tr. 329)

[7]Nevertheless, agents of Local 660 continued throughout the strike to urge non-striking employees to leave their jobs. (R.Tr. 860-62, 1055-56)

been no strike activity by the District's employees subsequent to July 1976. (R.Tr. 1012)

## III.

## ARGUMENT.

### A. The Superior Court's Finding of Liability for Appellants' Strike Activity Must Be Affirmed.

Appellants challenge the Superior Court's award of damages, caused by Appellants' strike activity, on the basis that (1) strikes by public employees are not unlawful in California, and (2) damages may not be awarded against Appellants regardless of the legality of the strike activity. All of Appellants' various arguments in this regard are without merit.

#### 1. Appellants' Strike Activity Was Illegal.

Every California court to address the issue has held that, in the absence of specific legislative authorization, a strike by public employees is illegal.[8] The decision in this

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[8] *See, e.g., International Brotherhood of Electrical Workers, Local Union 1245 v. City of Gridley,* 121 Cal. App. 3d 169, 175 Cal. Rptr. 274 (1981), hearing before the Supreme Court pending; *Stationary Engineers v. San Juan Water District,* 90 Cal. App. 3d 796, 801, 153 Cal. Rptr. 666 (1979); *Pasadena Unified School District v. Pasadena Federation of Teachers,* 72 Cal. App. 3d 100, 140 Cal. Rptr. 41 (1977); *City and County of San Francisco v. Evankovich,* 69 Cal. App. 3d 41, 137 Cal. Rptr. 883 (1977); *Los Angeles Unified School District v. United Teachers,* 24 Cal. App. 3d 142, 145, 100 Cal. Rptr. 806 (1972); *Service Employees' International Union, Local No. 22 v. Roseville Community Hospital,* 24 Cal. App. 3d 400, 408, 101 Cal. Rptr. 69 (1972); *Trustees of California State Colleges v. Local 1352, S.F. State Etc. Teachers,* 13 Cal. App. 3d 863, 867, 92 Cal. Rptr. 134 (1970); *City of San Diego v. American Federation of State Etc. Employees,* 8 Cal. App. 3d 308, 310, 87 Cal. Rptr. 258 (1970); *Almond v. County of Sacramento,* 276 Cal. App. 2d 32, 35, 80 Cal. Rptr. 518 (1969); *see also*

judicial district which clearly disposes of this issue is *Pasadena Unified School Dist. v. Pasadena Federation of Teachers, supra.* The *Pasadena* case involved a one-day work stoppage by public school teachers allegedly "advised and induced" by the defendant union, its president and others. The Superior Court sustained defendants' demurrer and dismissed the plaintiff school district's complaint for damages resulting from the strike. This Court reversed the Superior Court's dismissal and remanded the case for trial. Quoting extensively from *Los Angeles Unified School Dist. v. United Teachers, supra* at 146, and other cases, the Court held:

> "[W]e . . . 'can conceive of no benefit which would result from our reanalyses of the same issues which the . . . cited opinions have exhaustively treated, with extensive citation of authority.' We find these authorities persuasive that the strike by plaintiff's employees was unlawful."

72 Cal. App. 3d at 107. The several cases decided after *Pasadena,* cited above, have not changed the analysis or the rule. Public employee strikes are still illegal, in the absence of appropriate legislation.[9]

Appellants cite *San Diego Teachers' Association v. Superior Court,* 24 Cal. 3d 1, 154 Cal. Rptr. 893, 593 P.2d 838 (1979), for the proposition that the legality of public employee strikes is an unresolved issue in California.

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*Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen,* 54 Cal. 2d 684, 687, 8 Cal. Rptr. 1, 355 P.2d 785 (1960) (dictum).

[9]Labor relations of school districts are now covered by the Education Employment Relations Act ("EERA"). *Gov't Code § 3540 et seq.* (West 1980 & Supp. 1983). The strike in *Pasadena* occurred over two years prior to the effective date of EERA, July 1, 1976, so the statute relevant to the school district's labor relations was the Meyers-Milias-Brown Act, as is the case here.

Appellants' Brief at 5. A careful reading of the *San Diego Teachers* case reveals, however, that the Supreme Court's holding was that it had *no jurisdiction* to decide the legality of the strike in that case.

In *San Diego Teachers* the defendant labor union ("SDTA") engaged in strike activity against the San Diego Unified School District ("school district"). The school district sought and obtained a preliminary injunction. The Supreme Court held, however, that the superior court had no jurisdiction to issue the injunction, reasoning that the Public Employment Relations Board ("PERB") established under EERA had exclusive jurisdiction to decide in the first instance whether the SDTA's strike activities were unlawful under EERA, and whether PERB should seek injunctive relief in the superior court. *San Diego Teachers* expressly rejected the notion that PERB and the courts shared, in some instances, jurisdiction to pass on the legality of public employee strike activities under EERA. Thus, the Court's statement that "it is unnecessary here to resolve the question of the legality of public employee strikes," 24 Cal. 3d at 7, implies at most only that the courts have no power to decide strike legality issues under EERA.[10]

Accordingly, *San Diego Teachers* is perfectly consistent with the Supreme Court's statement in *Los Angeles Metro-*

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[10]For the same reason, the Supreme Court's recent decision in *El Rancho Unified School District v. National Education Ass'n,* L.A. 31581 (May 31, 1983), is completely inapposite here. There, the Court held that the courts have no jurisdiction to award damages for strike activity which is "arguably protected or prohibited" under EERA, since such activity, under *San Diego Teachers,* is within the exclusive jurisdiction of PERB. As noted, the Legislature has not created an independent agency to administer the Meyers-Milias-Brown Act. The trial court in this case, therefore, clearly had jurisdiction to award damages for Appellants' illegal conduct.

*politan Transit Authority v. R.R. Trainmen,* 54 Cal. 2d at 687, 8 Cal. Rptr. at 2, that "[i]n the absence of legislative authorization public employees in general do not have the right to strike." In *R.R. Trainmen,* the Supreme Court expressly held that the Legislature had given the right to strike to a particular class of public employees. Similarly, in *San Diego Teachers,* the Supreme Court held that the Legislature had committed the initial determination of strike legality under EERA to PERB. Neither case is authority for Appellants' contention that the right of public employees to strike, such as the District's employees who are not covered by EERA or by legislation giving them a right, is somehow undecided in this state. Moreover, even if *San Diego Teachers* stood for the proposition that the right of employees subject to the Meyers-Milias-Brown Act to strike is unresolved by the Supreme Court, it in no manner diminishes the dispositive, precedential authority of *Pasadena* in this district.

Appellants also argue that the Supreme Court's decision in *City and County of San Francisco v. Cooper,* 13 Cal. 3d 898, 120 Cal. Rptr. 707, 534 P.2d 403 (1975), leaves open the question of the legality of public employee strikes, and is inconsistent with awarding damages caused by a public employee strike.[11] The *Cooper* case was a suit by the City and County of San Francisco and the San Francisco Unified School District to compel the Controller of San Francisco to implement salary increases reflected in the city and county's salary standardization ordinance and the school district's salary schedule resolution. The Controller had refused to do so because of a prior taxpayer suit. In both lawsuits, the real party in interest, the taxpayer, argued that the salary standardization ordinance and the salary schedule resolution were

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[11]The latter aspect of Appellants' argument is discussed in Part III (A) (3) (a), *infra.*

invalid "because they were adopted 'as a result of' and 'under the coercion of,' an illegal public employee strike." 13 Cal. 3d at 905. The Supreme Court refused, however, to invalidate the two "legislative" actions (*i.e.*, the ordinance and resolution) on the basis that the judiciary had no authority to investigate the motive behind a legislative body's actions because of the principle of separation of powers. It was therefore unnecessary to rule on the unions' contention that the strike in *Cooper* had been legislatively authorized.

In any event, even had the *Cooper* Court expressly stated the legality of public sector strikes to be unresolved in the Supreme Court, it would be scant comfort to Appellants in the face of uniform Court of Appeal precedent holding strikes by public employees to be illegal.

Appellants also argue that public policy presently dictates the blanket legalization of all public employee strikes, whether or not the Legislature has spoken, invoking the spectre of labor unrest and the alleged unfairness of the prohibition of public sector strikes.

Contrary to Appellants' suggestion, labor peace is not served by granting public employees the unfettered right to strike. The 1974 strike was settled with an amnesty agreement dismissing all court proceedings. Nevertheless, despite that "peaceful" resolution, coerced through strike activity, Appellants struck *again* just two years later. Thus, it can hardly be said that the 1974 strike and its settlement produced any permanent labor peace.

Conversely, after 12 days, the 1976 strike was resolved through the execution of a successor MOU (Ex. 355), embodying the District's pre-strike offer, despite the fact that the District refused to agree to an amnesty dropping all legal and disciplinary actions. There has not been a

strike in the ensuing seven years, during which this litigation has been pending. (R.Tr. 1012) The position espoused by Appellants that litigation necessarily exacerbates public labor disputes, therefore finds no support in this record.

Nor is the illegality of sanitation worker strikes unfair. It is axiomatic that the intent of any economic strike is to pressure the employer by either inhibiting or stopping its ability to operate. If an employer can continue to operate during a strike, it has less economic incentive to come back to the bargaining table with a better offer. There is abundant evidence in the record before this Court that impairing or completely curtailing the District's ability to operate was precisely Appellants' objective. Indeed, the "hot-line" messages from Local 660 to its members throughout the strike emphasized the curtailment of District operations. (Ex. 191) Here, however, curtailment of operations does not merely result in the imposition of economic pressure. Rather it places at risk the health and safety of an entire community.

Unquestionably, Local 660 and striking employees knew of the health and ecological dangers a successful strike would cause. Had Appellants been successful in their express intent to shut down the District's facilities, over 4 billion gallons of raw sewage could have been discharged into the Pacific Ocean. The consequences of such an occurrence would be disastrous. The court in *State of California v. City and County of San Francisco,* 94 Cal. App. 3d 522, 156 Cal. Rptr. 542 (1979), a case involving a six-day sewage worker strike, detailed the incalculable harm the discharge of 426 million gallons of sewage (a mere one tenth of the amount involved here) into the ocean had caused:

> "[V]isible discharge of sewage solids, odors, discoloration and turbidity (milkiness) [was evident] at

all sites. Samples of water showed coliform (waste material from colon of warm-blooded animals) levels over the permitted limit. Aerial photographs showed black discharge, floating sheen and numbers of scavenger birds.

"Marine life was harmed because chronium exceeded toxic levels. Testimony in the court below indicated that the sewage would have caused varieties of harm to fish and benthic organisms (those living near the bottom of the sea) although specific injuries were unknown."

94 Cal. App. 3d at 526; *see also Caso v. District Council 37, American Federation etc. Municipal Employees,* 43 App. Div. 2d 159, 350 N.Y.S. 2d 173 (1973) (Sanitation strike resulted in discharge of one billion gallons of untreated sewage into East River). (*See, e.g.,* R.Tr. 330-34, 327, 358; Ex. 189, Ex. 183)

In short, Appellants' public policy argument reduces to the proposition that Local 660 and the employees it represents have a right to endanger the health of four million residents of Los Angeles County.

Moreover, even assuming that Appellants' conclusory statements concerning the policy justifications for allowing public employees the right to strike were colorable, Appellants are simply in the wrong forum. The delicate balances involved in labor relations regulation and the guarantees of employer and employee rights,[12] both in the public and private sectors, have always been established through legislation, such as the National Labor Relations Act ("NLRA"), as amended, 29 *U.S.C.* § 151 *et seq.* (1977), the Meyers-Milias-Brown Act, EERA and other

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[12]At common law, all strikes were illegal. *See, e.g., Walker v. Cronin,* 107 Mass. 555 (1871); *cf. Loewe v. Lawlor (Danbury Hatter's),* 208 U.S. 274 (1908).

legislative schemes. In these enactments, the Congress and the California Legislature have recognized the need for individualized treatment for particular industries. In the NLRA, for example, Congress fashioned special rules for the construction industry, the garment industry, 29 *U.S.C.* § 158(e) & (f), and the health care industry. 29 *U.S.C.* § 158(g). California has a different statutory scheme for the public school systems (EERA), than for institutions of higher education. *Gov't Code* § 3560 *et seq.* (West 1980 & Supp. 1983) (Higher Education Employer-Employee Relations Act) ("HEERA"). The Meyers-Milias-Brown Act, the relevant statute in this case, is in turn distinct from EERA and HEERA. Given the subtle, carefully-crafted legislative distinctions not only between public and private sector employees, but also among various classes of such employees,[13] Appellants' demand for a right to strike must be directed to the legislature. *See Stationary Engineers, Local No. 39 v. San Juan Suburban Water District, supra; Almond v. County of Sacramento, supra; Newmarker v. Regents of the University of California,* 160 Cal. App. 2d 640, 646, 325 P.2d 558 (1958). Even the court in *City of Fairmont v. Retail etc. Union,* 283 S.E. 2d 589 (W.Va. 1981), a case relied upon by Appellants, recognized:

> "[I]n most other states the legislature has made an effort to make some statutory accommodations to the labor relation problems that exist in the public sector. Indeed, it was the initial inability of the courts to judicially resolve [sic] the competing interests of

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[13]The basis for distinctions among classes of public employees is readily apparent. For example, the potential for immediate, devastating harm to public health and safety is obviously much less in a strike by public school teachers than it is in a strike by sanitation workers, police or firemen. Thus, the Legislature has enacted differing schemes for regulating the labor relations of these distinct classes.

> private employees and private employers that led to federal legislation in the labor law field. Most if not all commentators in the labor law area agree that the complex issues in this field are ill suited to any comprehensive judicial solution."

283 S.E. 2d at 595.

In sum, the Legislature is the appropriate forum in which the common law illegality of public employee strikes is to be weighed. Moreover, even were Appellants' arguments properly addressed to the courts, they are little more than an unsupported and conclusory recitation, at odds with the evidence in this case and inimical to the public health and safety.

**2. Appellants' Contentions Concerning the District's Good Faith During Negotiations and an Alleged Constitutional Right to Strike Are Neither Legally Sufficient as Alleged, Nor Supported in the Record.**

Appellants raise two other broad claims in an effort to legitimate their strike. First, they contend that their actions are justified by the District's alleged failure to bargain in good faith. Second, Appellants claim that depriving public employees of the right to strike denies them constitutional equal protection and freedom of assembly and speech guarantees. These claims are noteworthy only in the frequency and consistency with which the courts have rejected them.

With reference to the first of these arguments, the District notes that wholly apart from the fact that it bargained in good faith, courts have uniformly rejected the notion that a public agency's lack of good faith bargaining justifies illegal strike activity under the Meyers-Milias-Brown Act. In *Stationary Engineers Local No. 39 v. San Juan Suburban Water District, supra,* the lone case cited by Appellants, the court categorically stated:

> "[U]nder California law public employees have no right to strike whether their employer violates the Meyers-Milias-Brown Act or not."

90 Cal. App. 3d at 801 (citation omitted). The court noted that had the employees in that case had a legitimate grievance concerning the lack of good faith by the employing agency, their remedy was judicial. *See Placentia Fire Fighters, Local 2147 v. City of Placentia,* 57 Cal. App. 3d 9, 126 Cal. Rptr. 126 (1976). The court in *Stationary Engineers* discussed whether there was merit to the employees' allegations of lack of good faith bargaining, but contrary to Appellants' suggestion, there is no implication in the decision whatsoever that a lack of good faith by a public agency under the Meyers-Milias-Brown Act justifies or legitimates public employee strike activity.[14]

Moreover, the record in the instant case conclusively demonstrates the District's good faith bargaining. There is no evidence that the District ever failed or refused to "meet and confer in good faith regarding wages, hours, [or] other terms and conditions of employment." *Gov't Code* § 3505 (West 1980). There is no evidence that the District was not seriously trying to reach an agreement. The evidence affirmatively demonstrates that the District made economic concessions in its June 23 offer, which Local 660 rejected. (R.Tr. 163-66) On July 1, 1976, the District offered a package of economic and other conces-

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[14]For other cases rejecting such a justification for public employee strikes, *see Los Angeles Unified School Dist. v. United Teachers, supra; Trustees of Cal. State Colleges v. Local 1352, S. F. State etc. Teachers, supra; City of San Diego v. American Federation of State etc. Employees, supra; Almond v. County of Sacramento, supra; see generally, City and County of San Francisco v. Evankovich, supra,* 69 Cal. App. 3d at 47-48, and cases cited there; *Gov't Code* § 3509 (West 1980).

sions beyond those of June 23. (R.Tr. 246-47) Local 660 in turn rejected the terms of this July 1 offer.[15]

Appellants spent a great deal of time and effort at trial attempting to prove that the District's bargaining proposals would have resulted in a net decrease in pay for some employees.[16] Yet, even if this had been shown, it would not establish bad faith. In *Placentia Fire Fighters, Local 2147 v. City of Placentia, supra,* for example, the plaintiff labor union sought to show the defendant city's bad faith based, *inter alia,* on its proposed reduction of hours from 67 to 40 per week and elimination of certain fringe benefits. The court rejected this argument, reasoning that the Meyers-Milias-Brown Act contains "the right to remain firm." 57 Cal. App. 3d at 22. Appellants' apparent contention that proposing a pay cut is *per se* in bad faith under the Meyers-Milias-Brown Act is, therefore, frivolous.

Appellants' explicit contention that conditioning the July 1 offer upon recommendation of acceptance by Local 660's negotiating committee constituted bad faith bargaining is nothing more than a conclusory, unsupported statement. Appellants cite no authority, nor is there any, for the novel proposition that this condition constituted a failure to meet and confer in good faith under the Meyers-Milias-Brown Act. In short, the record clearly demonstrates the District's good faith, even were such relevant. *See generally NLRB v. General Electric Co.,* 418 F.2d 736 (2d Cir. 1969), *cert. denied,* 397 U.S. 965 (1970).

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[15]Indeed, because Local 660's negotiating committee refused to recommend acceptance of the July 1 offer, the offer which Local 660 ultimately accepted on July 16, it was not even *presented* to the membership of Local 660 prior to the strike. (R.Tr. 169-73, 593, 625-26)

[16]The record is clear that neither the District's June 23 offer nor its July 1 offer would have resulted in a pay cut. (R.Tr. 148-49, 240-42, 619, 628-29, 1049; *see* Ex. 182, Ex. 355)

Appellants also contend that the purported right peacefully to withdraw services from a public sector employer is of constitutional dimensions, apparently predicated on freedom of speech.[17] They further argue that "since private sector employees have the right to strike," Appellants' Brief at 9, the prohibition against public employee strikes contravenes constitutional equal protection guarantees. California courts have rejected both these contentions on numerous occasions.

In the *Pasadena* case, the Court, after extensive discussion of the relevant case law, concluded:

> "The foregoing authorities support the constitutionality of even prior restraint upon speech advocating an illegal strike by public employees. If such prior restraint is permissible, a fortiori the restraining effect of subsequent liability for damages which plaintiff here seeks to impose does not violate defendants' free speech rights."

72 Cal. App. 3d at 110; *see also, City and County of San Francisco v. Evankovich, supra; Los Angeles Unified School District v. United Teachers, supra.*

Regarding Appellants' equal protection argument, the court in *City of San Diego v. American Federation of State etc. Employees Local No. 127, supra,* after assuming that the right to strike was a "fundamental interest" under traditional equal protection analysis, unequivocally rejected that argument. The court noted:

> "[The Union] argues the rule of law denying a gardener on a public golf course the right to strike

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[17]Appellants also refer to freedom of assembly in apparent connection with the "right to associate into a union." Appellants' Brief at 9. The right of employees to join and participate in labor organizations *per se* is not, however, in any way relevant to this case.

> while affording a gardener on a private golf course that right, does not serve a compelling state interest. The reasons for the law denying public employees the right to strike while affording such right to private employees are not premised on differences in types of jobs held by these two classes of employees but upon differences in the employment relationship to which they are parties. *The legitimate and compelling state interest accomplished and promoted by the law denying public employees the right to strike is not solely the need of a particular governmental service but the preservation of a system of government in the ambit of public employment and the proscription of practices not compatible with the public employer-employee relationship."*

8 Cal. App. 3d at 315 (citation omitted) (emphasis added). Of course, the instant case involves not a "gardener on a public golf course," but employees whose work directly affects the health and welfare of four million citizens of this State. Thus, Appellants' argument is even less persuasive than that rejected in *City of San Diego.*

Appellants cite three cases in support of their constitutional arguments. *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union,* 61 Cal. 2d 766, 40 Cal. Rptr. 233, 394 P.2d 921 (1964), *cert. denied,* 380 U.S. 906 (1965), which dealt with picketing on private property, was cited as distinguishable in *Evankovich, supra,* 69 Cal. App. 3d at 48. Similarly, *Bagley v. Washington Township Hospital District,* 65 Cal. 2d 499, 55 Cal. Rptr. 401, 421 P.2d 409 (1966), a case involving the constitutionality of prohibiting the political activities of public employees, was held inapposite by the court in *City of San Diego, supra.* There, the court tersely noted:

> "The no-strike rule is not a restriction on the political activities of public employees."

8 Cal.App.3d at 314 n. 1. The third case Appellants cite in support of their oft-rejected constitutional argument, is *Robins v. Pruneyard Shopping Center,* 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), *aff'd,* 447 U.S. 74 (1980). The issue in that case was whether a private shopping mall could constitutionally prohibit a group of high school students from soliciting signatures on a political petition on mall premises. Obviously, this case provides no support for a constitutional right to strike.

In conclusion, the dearth of factual or legal support for Appellants' arguments is painfully obvious. They must therefore be rejected.

**3. The Award of Damages Is An Appropriate Remedy for Appellants' Illegal Strike Activity.**

Appellants also attack the propriety of a damage award even for otherwise illegal strike activity. The law is clear, however, that the trial court was empowered to award to the District damages caused by Appellants' illegal work stoppage on two independent bases. First, damages were appropriately awarded in tort for Appellants' wrongful and illegal conduct. Second, damages were appropriately awarded under the court's "clean up" jurisdiction in equity.

a. *Tort Damages.*

*Pasadena, supra,* recognized the independent right of a public employer to recover tort damages caused by an illegal strike. In that case, the plaintiff school district had sought recovery of damages based on a theory of tortious inducement of breach of contract, and on a theory of "direct liability for harm resulting from unlawful acts." 72 Cal. App. 3d at 111. Regarding the latter theory, the court held:

> "Moreover, liability can be imposed on defendants upon a theory wholly independent of tortious induce-

> ment to breach the teachers' contract with plaintiff. *The conduct of an unlawful strike is itself a tort for which damages may be recovered.*"

72 Cal. App. 3d at 112 (emphasis added).

Clearly, "the conduct of an unlawful strike" caused the District damage in this case which, under *Pasadena,* may be recovered in tort. *See also State of California v. City and County of San Francisco, supra* (recovery of civil penalties for strike-caused damage against both employer and striking union); *Caso v. District Council 37, supra* (tort damages awarded to municipalities injured by discharge of untreated sewage against striking union).

Appellants attempt to meet the well-established rule that tort damages may be recovered for an illegal public employee strike with a single, involuted argument. Appellants claim that the California Supreme Court's decision in *City and County of San Francisco v. Cooper, supra,*[18] is inconsistent with the tort damage remedy recognized in *Pasadena.* Appellants hypothesize that if San Francisco, under the facts of *Cooper,* had sued the striking labor organizations for damages, the Court would, under *Pasadena,* have been able to award such damages. Appellants reason that the fruits of the illegal strike in *Cooper, (i.e.,* the added economic cost of the MOU), would constitute tort damages under *Pasadena,* and rhetorically ask: "How can San Francisco, on one hand, sue for such damages, and on the other hand, be held liable on the enforceable [MOU] for the increased salaries?" Appellants' Brief at 5.

Appellants' confusing attempt to demonstrate a logical inconsistency between *Cooper* and *Pasadena* is without merit. As noted in Part III(A)(1), *supra,* the *Cooper*

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[18] *Cooper* is discussed in Part III(A)(1), *supra.*

court enforced the salary ordinance because the courts have no authority to investigate legislative motives. For the same reason, the *Cooper* Court could not have awarded damages in Appellants' hypothetical lawsuit, because the Court could not constitutionally decide whether the increased salary costs were "caused by" an illegal strike, a necessary element of the tort recognized in *Pasadena.*

Thus, *Cooper* is perfectly consistent with the damage remedy in *Pasadena* and in the case at bar. In *Pasadena,* as here, there are no constitutional separation of powers considerations entangled in the damage causation question, as there would be in Appellants' hypothetical damage suit. Thus, the alleged inconsistency between *Cooper* and a damage remedy for illegal public employee strikes is based on patently incorrect premises and must be rejected.

b. *Damages Under Equity "Clean Up" Jurisdiction.*

Apart from the trial court's power to award tort damages, the trial court also retained equity jurisdiction under which "clean up" damages could be awarded. "It is the general rule that such damages as are properly incidental to the principal [equitable] relief sought may be recovered; and this is true as to incidental damages sustained after the suit is brought." 38 *Cal. Jur.* 3d, Injunctions, § 91 at 604 (1977) (citations omitted). The trial court issued its Temporary Restraining Order on July 6, 1976. For the next 11 days, Appellants cavalierly ignored the court's order, causing damage for which the District seeks recompense, and to which the District is entitled.[19] *See Steiner v. Long Beach Local No. 128,* 19 Cal.

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[19]Appellants argue, in a cryptic footnote, that such "clean up" damages are not supported by precedent or other authority, "since there is a different purpose and burden of proof regarding a violation

2d 676, 685-86, 123 P.2d 20 (1942); *Sapiro v. Frisbee,* 93 Cal. App. 299, 270 Pac. 280 (1928).

**B. The Superior Court's Damage Award Must Be Affirmed in All Respects.**

As previously noted, the trial court awarded the District damages in the amount of $246,904.00. As calculated in the court's Minute Order, dated April 27, 1981, the court arrived at this figure by starting with $375,347.00 in overtime costs and other strike-related expenses. From this, the court deducted savings to the District of unpaid salaries of striking employees, and related savings for unpaid FICA,[20] pension and overtime and added back in the cost to the District of continued health insurance coverage.

Appellants stipulated at trial, with one minor exception,[21] that the District's overtime expenses were actually incurred. Nor do Appellants dispute that the District actually paid the other expenses included in the

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of an injunction," citing *Stafford v. United Farm Workers,* 33 Cal. 3d 319, 188 Cal. Rptr. 600, 656 P.2d 564 (1983). Appellants' Brief at 9 n. 17. This case involved the vicarious liability of the United Farm Workers, for injuries the plaintiff sustained in a traffic accident, allegedly caused by the negligence of picketers in parking their vehicles. The Supreme Court held that a TRO restraining certain conduct of the picketers was irrelevant to the negligence action, was prejudicial and was, therefore, erroneously admitted into evidence, *Stafford* is obviously irrelevant to Appellants' unclear proposition. In the absence of relevant precedent or argument, the trial court's authority to award incidental damages under its equitable power to enjoin the illegal strike is clear.

[20]FICA refers to Social Security contributions.

[21]Appellants argue that compensatory time off, included as $16,040.00 of the overtime expense in the award was not an appropriate item of damage, as the District allegedly did not prove any damage associated with this item. This contention is discussed in Part III(B)(2)(b), *infra.*

$375,347.00 figure. Appellants' quarrel with the trial court's findings of fact in regard to the amount of damages rests on four basic contentions: (1) that the level of staffing during the strike and other strike-related measures were unnecessary and unreasonable; (2) that the District incurred no costs for strike-related compensatory time; (3) that the method by which time and payroll records were kept during the strike was inadequate; and (4) that some of the overtime expense was not properly payable. Each of these assertions will be discussed below, in the context of the appropriate standard of appellate review.

**1. The "Reasonableness" of the District's Response to Appellants' Illegal Strike Must Be Reviewed as a Finding of Fact.**

a. *Appellate Standard of Review.*

The "fundamental doctrine [of appellate review] stated and applied in hundreds of cases," 6 B. Witkin, *Cal. Proc.*, Appeal § 245 at 4237 (2d ed. 1971), is that the trial court's judgment and factual findings and inferences drawn therefrom will be upheld if there is any substantial evidence to support them. *See, e.g., In re Marriage of Mix,* 14 Cal. 3d 604, 614, 122 Cal. Rptr. 79, 85-86, 536 P.2d 479 (1975); *Estate of D'India,* 63 Cal. App. 3d 942, 950, 134 Cal. Rptr. 165, 169 (1976); *Nestle v. City of Santa Monica,* 6 Cal. 3d 920, 925-26, 101 Cal. Rptr. 568, 571, 496 P.2d 480 (1972); 6 B. Witkin, *Cal. Proc.,* Appeal § 249 at 4241, § 254 at 4245-46 (2d ed. 1971); *compare Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951) (NLRB's findings of fact upheld if supported by substantial evidence on the record *as a whole).*

b. *The District's Entitlement to Damages for Various Expenditures Is a Question of Fact.*

The basis for the District's damage claim is its right to recover the cost of reasonable actions taken to avoid the harmful, potential effects of Appellants' illegal strike. *See* 23 *Cal. Jur.* 3d, Damages §§ 40-42 (1982); *see also, Barnes v. Berendes,* 139 Cal. 32, 72 Pac. 406 (1903); *modifying on other grounds,* 139 Cal. 39, 69 Pac. 491 (1902); *Pacific Telephone & Telegraph Co. v. Granite Construction Co.,* 225 Cal. App. 2d 765, 37 Cal. Rptr. 727 (1964). The primary damage issue resolved by the trial court was whether the District's actions, for which costs were admittedly incurred, were "reasonable."

It is axiomatic that the determination of "reasonableness" in this and other contexts is a question of fact. *See, Green v. Smith,* 261 Cal. App. 2d 392, 397, 67 Cal. Rptr. 796 (1968); *Sackett v. Spindler,* 248 Cal. App. 2d 220, 239, 56 Cal. Rptr. 435, 447 (1967); *Basin Oil Co. v. Baash-Ross Tool Co.,* 125 Cal. App. 2d 578, 601, 271 P.2d 122, 135-36 (1954). Thus, under the standard of appellate review set forth above, the question on appeal is limited to whether there is substantial evidence in the record to support the trial court's findings that the District's response to the illegal strike was reasonable. Further,

> "[t]he reasonableness of the efforts of the injured party must be judged in the light of the situation confronting him at the time the loss was threatened and not by the judgment of hindsight."

*Green v. Smith, supra,* 261 Cal. App. 2d at 396; *see also, Huntington Beach Union High School District v. Continental Information Systems Corp.,* 621 F.2d 353, 357 (9th Cir. 1980), quoting *Green v. Smith* with approval; *Basin Oil Co. v. Baash-Ross Tool Co., supra.* As demonstrated below, substantial evidence supports the trial court's findings of

fact, and its proper application of the test outlined in *Green v. Smith.*

**2. The Record Contains Substantial Evidence Supporting the Judgment and Underlying Findings of Fact and Must Be Affirmed.**

Much of Appellants' Opening Brief is devoted to a rehash of the evidence.[22] Appellants' contention that some evidence allegedly favors a reduction in the damage award is, however, hardly the necessary demonstration that *no* substantial evidence supports that award. *Overton v. Vita-Food Corp.*, 94 Cal. App. 2d 367, 370, 210 P.2d 757 (1949). Appellants' discussion is, therefore, largely irrelevant. Moreover, substantial, indeed overwhelming, evidence supports the trial court's findings that the District's response to Appellants' unlawful strike was "reasonable" and "proper." *See* Findings of Fact, ¶¶ 10, 11 & 12 (C.Tr. 483-84).

a. *The District's Staffing and Other Expenses During the Strike Were Reasonable and Necessary.*

Appellants attack the trial court's finding that the District's staffing was "reasonable in the light of the strike situation that confronted the District between July 5, 1976 and July 18, 1976," Findings of Fact, ¶ 10 (C.Tr. 483), alleging that extra personnel and longer hours resulted in excessive overtime expenses.[23] The record contains clear and substantial evidence, however, supporting the trial court's finding in every respect.

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[22]Significantly, Appellants make no claims of error, prejudicial or otherwise, in the trial court's evidentiary rulings.

[23]As noted, the parties have stipulated that all overtime expenses were actually paid. (R.Tr. 15) Whether the trier of fact's finding that all such expenses were proper is discussed in Part III(B)(2)(d), *infra. See* Findings of Fact, ¶ 11 (C.Tr. 483-84).

In preparing for the 1976 strike, the District's primary concern was to insure continued operation of the sewage treatment plants,[24] and the landfills. (R.Tr. 356) To minimize strike-related disruption and maximize the chances of successfully operating the treatment plants, the District prepared strike-contingency plans. (Ex. 145; R.Tr. 358) The strike-contingency plans were not, however, created in a vacuum. The District had undergone its "baptism of fire" in the 1974 strike, and knew what was necessary to keep the plants and landfills operative. The District was also aware that the 1974 strike had involved virtually 100% of the blue-collar employees (R.Tr. 711), and strike-related sabotage and vandalism. (R.Tr. 358)

Against this background, the strike-contingency plans provided for 24-hour staffing for all sewage treatment plants and maintenance yards with at least two management or professional employees for each facility. (R.Tr. 260, 269, 283-84) Guards from various security services were hired for added security at the JWPCP. (R.Tr. 325-26) The District's witnesses repeatedly testified that these measures were necessary for plant security and emergency response capability. (*E.g.*, R.Tr. 260, 269-71, 283-84, 946, 952) Indeed, Roger Beeken testified that staffing the treatment plants on a smaller scale would have been "irresponsible." (R.Tr. 938)

The landfill strike-contingency plan required similar staffing. First, rather than the normal, overlapping shifts, where 30-40% of the landfill employees began working approximately ½ hour before the landfill opened to the public, with the other 60-70% arriving some two hours later and remaining for a corresponding longer period,

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[24]The drastic monetary, ecological and public health consequences of dumping billons of gallons of raw sewage into the Pacific Ocean discussed above, needs no emphasis here.

the District required all landfill employees during the strike to report at the earlier time. (R.Tr. 362-63, 974) The staggered shift was eliminated during the strike so management would have sufficient notice of the availability of personnel. (R.Tr. 359-60) Further, operations at each landfill were consolidated to one location, and acceptance of liquid waste was curtailed. (R.Tr. 362-63) Extra guard services were obtained for round-the-clock security at each landfill. (R.Tr. 367)

Appellants question the necessity of security and staffing measures. One major theme running throughout Appellants' argument is that nothing happened during the strike to justify the staffing set forth in strike-contingency plans. Not only is the factual premise of this argument incorrect,[25] it is irrelevant to whether the District's staffing during the strike was reasonable. Appellants' argument seems to be that the District's strike-contingency plans were *too* successful in averting strike-related damage. Had the District experienced more problems, demonstrated that operation of landfills or treatment plants was curtailed or perhaps been able to point to significant injury to property or the environment, *then,* Appellants apparently argue, the District's response to the strike would have been reasonable. (*See* R.Tr. 1038-41) In the absence of these or similar showings, Appellants maintain, the District's staffing was excessive. Placed in perspective, this argument requires no refutation. Certainly, had operation of treatment plants or landfills actually been curtailed or halted, Appellants doubtless would have argued that staffing measures were inadequate. In any event, the District's success in averting the potentially disastrous consequences of Appellants' unlawful conduct, is simply irrelevant to the reasonableness of the District's actions.

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[25]*See* discussion, *supra,* at pp. 15b-17b.

A second theme in Appellants' attack is that the District's staffing should have been curtailed at facilities where non-striking blue-collar workers were available in sufficient numbers. This argument overlooks several significant facts. Even in those locations where significant numbers of blue-collar employees came to work, the District had no guarantee that they would continue to work. Appellants would discount this concern "as it cannot be assumed that an employee who decided not to go on strike would then, during the course of the strike, leave his work." Appellants' Brief at 18 n. 22. Appellants ignore the undisputed fact that *they* attempted throughout the strike to persuade non-strikers to leave their work. (R.Tr. 860-62, 1055-56) Certainly, Appellants would not have attempted to persuade non-strikers to join the strike if there were no hope of success. Furthermore, Local 660's own "Strike Bulletin" dated July 14, 1976, asserts "that a number of the guys now crossing the line are willing to join the picket lines." (Ex. 188) Appellants themselves therefore made precisely the assumption they now contend is without merit.

Moreover, there is evidence that the District's management personnel believed some employees had initially reported to work, only to join the strike thereafter. (R.Tr. 939, 949) Clearly, a good faith belief that non-striking blue-collar employees might join the work stoppage is sufficient to render the District's continued staffing reasonable. *See Barnes v. Berendes, supra.* In any event, the District did reduce management staffing levels during the strike where it appeared that blue-collar non-strikers would remain on the job in facilities where, for example, little picketing or other disruption had occurred. (R.Tr. 762, 924, 947-50, 1229)

A third aspect of Appellants' argument is the suggestion of alternatives to the District's strike-contingency

plans. With keen "20-20 hindsight" Appellants argue, as they argued to the trial court, that the District could have eliminated a great deal of overtime expense with alternative staffing responses to the strike. (Ex. 368); Appellants' Brief at 20-21. Similarly, Appellants suggest that the District could have relied on its ADT alarm system or guards[26] for security rather than require the constant presence of two management employees. Appellants' Brief at 18.

Here, again, there is substantial evidence in the record not only that the District's response to the strike was reasonable, but also that Appellants' "alternatives" were clearly not. In the JWPCP, for example, Appellants' suggested 12-hour shifts for available personnel would have required operating the JWPCP with only 360 man-hours per day. During normal operation, the JWPCP is staffed with employees working a total of over 1800 man-hours per day. (R.Tr. 935-36) Thus, Appellants' alternative was to have operated the JWPCP with 20% of the man-power utilized in normal operation, rather than with the allegedly unreasonable 40% staffing level the District maintained during the strike.

The record also clearly supports the inference that reliance on an alarm system alone for security would have been unreasonable. The District's witnesses testified that the alarm system merely notified appropriate personnel of malfunction and that the non-critical malfunctions which normally occur are not comparable to the serious damage a knowledgeable saboteur could wreak. At best, therefore, the alarm would not have informed management in time to avert potentially serious damage. (R.Tr. 936, 945) In

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[26]Ironically, Appellants question the necessity of guards at some locations, while suggesting that guards were preferable to 24-hour staffing at other locations. (R.Tr. 325-27, 946-48); Appellants' Brief at 18, 22.

any event, even if Appellants' alternatives were reasonable, "the person whose wrong forced the choice cannot complain that one rather than the other is chosen." *Green v. Smith, supra,* 261 Cal. App. 2d at 397.

A fourth argument apparently raised by Appellants is that even granting the necessity of the 24-hour presence of management and professional employees, the District allegedly should not have compensated these employees, and Appellants should not be liable, for hours they spent sleeping or otherwise "not working."[27]

The short answer to this unsupportable contention is found in the District's "Salary Resolution." (Ex. 130) As is clear from Section 5 of the Salary Resolution, the payment of overtime and the definition of employees eligible for such overtime was by reference to provisions of the Federal Fair Labor Standards Act ("FLSA"), 29 *U.S.C.* § 201 *et seq.*, "as if" that act had been applicable to the District. Thus, it was entirely appropriate for the trial court to examine the Regulations of the United States Department of Labor in administering the FLSA and by analogy, to apply those standards to the strike replacements who were required to work extremely long hours of overtime because of Appellants' unlawful strike activities.

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[27]In connection with this argument, Appellants point out a handful of alleged occurrences at a few of the smaller, more isolated facilities, to infer that management personnel were not always working during the strike. Thus, an alleged barbecuing incident at the Palmdale facility is mentioned no less than *three* times in Appellants' Brief, at 19-20; alleged reading and "walks" by one management employee, also at Palmdale, are mentioned no less than *five* times. Appellants' Brief at 19-20. The paucity of this evidence is merely emphasized by the "mileage" Appellants try to make out of it. In any event, the trier of fact was not required to credit either Appellants' evidence, or possible inferences drawn therefrom.

It is (and was in 1976) the general rule under the FLSA that if an employee is "suffered or permitted" to work overtime, even if not otherwise instructed or requested to do so, all time spent on overtime work is considered as "hours worked" (*i.e.*, as compensable time). *Armour & Co. v. Wantock,* 323 U.S. 126 (1944); 29 CFR § 785.11. Under appropriate circumstances, even the time that employees spend sleeping at the employer's premises is counted as "hours worked" if adequate sleeping facilities cannot be provided; if the employee cannot usually enjoy an uninterrupted night's sleep; or if the employee cannot get at least five hours of sleep during a scheduled sleeping period. The District's inability to provide a guarantee of at least five hours of uninterrupted sleep during the strike was established by the testimony of Roger Beeken. (R.Tr. 286-89) Thus, the *entire* time must be counted as working time. *General Electric Co. v. Porter,* 208 F.2d 805 (9th Cir. 1953), *cert. denied,* 347 U.S. 951 (1954); 29 CFR §§ 785.20 and 785.22.

The duties of managerial, professional and technical employees replacing blue-collar strikers were analogous to those required of ambulance drivers, firefighters and other types of employees, who spend a great deal of time waiting to respond to emergency situations. Thus, under the Department of Labor Regulations:

> "[A] stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, [a] fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity."

29 CFR § 785.15. As the strike replacements were on duty as much as 24 hours per day, and were not free from work responsibilities during such time, it was appropriate

and reasonable to compensate them for time spent eating or resting, 29 CFR §§ 785.18 and 785.19, whether such occurred on or off the treatment plants' or landfills' premises. *Armour & Co., supra; Skidmore v. Swift,* 323 U.S. 134 (1944); 29 CFR § 785.12.

Finally, a fifth argument raised by Appellants will be briefly addressed. Appellants attempted to show at trial, and again argue here, that staffing on Saturday, July 17, and Sunday, July 18, was excessive because the strike supposedly was over. However, upon closer examination it is clear that staffing on July 17 was substantially reduced (Ex. 134 through Ex. 139), and that so little overtime was worked on Sunday, July 18, that Appellants' own accountant could not even find it. (R.Tr. 1177)

Furthermore, although Saturday, July 17, was a regular workday at both the landfills and the sewage treatment plants, only about half the employees attended Local 660's meeting to ratify a new agreement on the *evening* of July 16, and Appellants took no special measures to contact the striking employees. (R.Tr. 1059-61, 631-32) In short, the record evidence supports the trial court's finding that the District's staffing and compensation policies during and immediately after the strike were entirely reasonable.

It would serve little purpose to address at length Appellants' other arguments as to the necessity and relation to the strike of other expenses. Suffice it to say that the reasonable necessity of each such expense, including meal costs, guard services, bedding supplies, etc., was supported by the testimony of District witnesses. (R.Tr. 295-97, 368-70) Appellants' dissatisfaction with the trial court's finding is, therefore, irrelevant.

b. *The Superior Court's Award of Damages for Compensatory Time-Off Is Supported by Substantial Evidence.*

Some of those employees required to work overtime during the 1976 strike elected to receive credit for "compensatory time" rather than to be paid for the overtime. (R.Tr. 59-64, 530-35) Compensatory time is a credit on an employee's record, allowing him paid time off in the future. *Id.* Appellants argue that the $16,040.00 awarded for compensatory time is not a proven element of damage, alleging that "there is no cost to the district if there are no replacements." Appellants' Brief at 10. Appellants' argument is frivolous and illogical.

First, there is no dispute that those employees electing compensatory time instead of overtime compensation were actually credited with the accrued right to take time off at some future date. Records were introduced which clearly demonstrate this accrual, and were supported with testimony. (Ex. 169 through Ex. 174; R.Tr. 92-93) The District was therefore obligated to these employees for compensatory time, in exactly the same manner as it is obligated to employees for accrued vacation or pension benefits. (R.Tr. 62-63); *see Longshore v. County of Ventura,* 25 Cal. 3d 14, 24, 157 Cal. Rptr. 706, 598 P.2d 866 (1979). Based on this evidence, the inference that employees entitled to take time off actually did so at some point is not only reasonable and supported in the record, it is also obviously one drawn by the trier of fact. (R.Tr. 62-63)

Second, Appellants' contention that "no replacement equals no cost" is a non sequitur. When an employee takes compensatory time off, he is paid the same as if he had worked. (R.Tr. 63) Thus, the District pays for employee services it does not receive. Therefore, regardless of whether the employee is replaced when he takes compen-

satory time off, the District clearly loses the reasonable value of the employee's services. The trial court properly concluded that such services are of the same value as the employee's wages.

Furthermore, the situation would not change, contrary to Appellants' suggestion, if the employee were in fact replaced. In that case, the District would pay the replacement employee's wages, but would receive the quid pro quo of the replacement's services. Whether or not an employee taking compensatory time off is replaced therefore has absolutely nothing to do with the District's damage.[28] The record evidence therefore clearly supports the trial court's award of $16,040.00 for the cost of accrued compensatory time credited for strike-related overtime.

c. *Substantial Evidence Supports the Superior Court's Reliance on the District's Payroll Records.*

Appellants also argue that the trial court should not have awarded damages for strike-related overtime expenses, because records establishing such damages were allegedly inadequate. The District's payroll and timekeeping methods, and the resulting business records, Appellants contend, were "inherently untrustworthy, as they were based on information given by employees who themselves had a personal interest in exaggerating the amount of overtime." Appellants' Brief at 14.

Appellants do not claim, nor could they, that the payroll records (Ex. 132 through Ex. 144) were incompetent

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[28]Indeed, the actual cost to the District for the strike-related, compensatory time was greater than $16,040.00, since this amount was based on wage rates *prior* to July 17, 1976, the effective date of the 1976-77 MOU. Thus, the wage rates of employees electing compensatory time were potentially *higher* when they took time off than during the strike when the compensatory time accrued.

or that the District did not actually pay the overtime expenses in accordance with such records. *Cf. Kitchel v. Acree*, 216 Cal. App. 2d 119, 30 Cal. Rptr. 714 (1963). (Damages based on inadmissible hearsay). In the absence of such claims, Appellants' argument is patently frivolous.

Appellants fail to mention that the timekeeping methods and records the District used during the 1976 strike, were in virtually all cases *identical* to normal record and timekeeping procedures.[29] (R.Tr. 46-48, 50, 85, 188-238) Moreover, the cross-checks and follow-up utilized in compiling these payroll records clearly demonstrate that Appellants' claim of inadequacy is incorrect in any event.[30]

In sum, Appellants' apparent claim that the District's payroll and timekeeping records were too untrustworthy

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[29]The only difference was that in some instances the employees who actually recorded hours at some facilities were not the employees who normally performed that job. (R.Tr. 188-238)

[30]The overtime paid during the strike was verified as follows. First, all hours worked by each employee at a given facility, including overtime, were recorded by the employee or employees having such responsibility at that facility, on a log, diary, or other record. Several such records, or back-up sheets, were admitted into evidence. (Ex. 134 through Ex. 139) Second, from the logs or back-up sheets, the responsible employee at each facility either prepared a special pay report for each employee (Ex. 133), or provided employees at the JAO with information by telephone, from which the special pay report for each employee was prepared. Third, each employee was required to sign his special pay report, certifying he had actually worked the overtime indicated thereon. (Ex. 169 through Ex. 174) Fourth, personnel department employees prepared a time roll from the signed special pay reports, and submitted it to the Los Angeles County Auditor-Controller, who prepared the payroll checks. (R.Tr. 188-238; Ex. 143)

to constitute substantial evidence completely misconceives this Court's function, and must be rejected.

d. *The Superior Court Correctly Concluded That Overtime Rates During the Strike Were Proper.*

Appellants' final complaint with the trial court's damage award is the allegedly improper payment of overtime to management and professional employees at time and one-half for all hours over 40 in one week. Neither the District's Board of Directors, nor the Salary Resolution (Ex. 130), Appellants argue, permitted the payment of overtime to management or professional strike replacements at that rate. Careful evaluation of the record reveals the lack of merit of Appellants' contentions.

As noted above, the Salary Resolution incorporates by reference the provisions of the FLSA. Thus, in accordance with the FLSA, the Salary Resolution divides the District's employees into "exempt" and "non-exempt" categories. The FLSA's basic rule was (and is) that non-exempt employees are to be paid at one and one-half times their hourly wage for all time worked in excess of 40 hours per week and that exceptions to that rule are to be narrowly construed against the employer. *Sutton v. Engineered Systems, Inc.*, 598 F.2d 1134 (9th Cir. 1979). Exempt employees, to whom this rule does not apply, include certain employees in *bona fide* executive, administrative, or professional capacities. 29 *U.S.C.* § 213. These exemptions generally are referred to as the "managerial" or "white collar" exemptions. The specific exemptions are not defined in the FLSA itself, but rather are set forth in regulations promulgated by the Wage and Hour Division of the U.S. Department of Labor. These regulations focus on two factors: the employees' duties and salary. The "test" for determining whether employees qualify for the exemptions are set out at 29 CFR §§ 541.101-541.103.

The managerial or professional exemption is lost, however, if an employee spends more than a specified percentage (*e.g.*, 20%, 29 C.F.R. § 541.3) of his hours during a workweek performing *non*-executive or *non*-professional duties.[31] If the exemption is lost, the employee is then treated for overtime purposes as non-exempt, and must be paid overtime accordingly. *Brennan v. Western Union Telegraph Co.*, 561 F.2d 477, 484 (3d Cir. 1977) *cert. denied, Western Union Telegraph Co. v. Marshall*, 434 U.S. 1063 (1978). Thus, under the express terms of the Salary Resolution, it was entirely appropriate to pay the strike replacements, who had lost their exempt status, the same level of overtime premium that would have been received by the striking employees if they had remained on the job and faithfully performed their duties. *See Adams v. City of Modesto*, 53 Cal. 2d 833, 3 Cal. Rptr. 561, 350 P.2d 529 (1960).

Even if Appellants were correct that the Salary Resolution does not authorize the payment of overtime to managerial and professional employees in this case, it does not follow that the trial court erred in including damages for the difference between overtime at time and one-half, and overtime in accordance with overtime for exempt employees under the Salary Resolution. The Salary Resolution is addressed to the District's normal, day-to-day operation. It was never intended to apply to an extraordinary or emergency situation, such as the strikes in 1974 and 1976, and did not, therefore, render inappropriate the overtime policy during the strike.

Moreover, completely apart from the Salary Resolution, the Board of Directors authorized the Chief Engineer to

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[31]It is undisputed that managerial and professional employees receiving overtime for "strike-duty" were performing blue-collar work. (R.Tr. 257, 286-87, 660-61, 853-55, 952)

"have sole control of the affairs of the . . . Joint Administrative Organization and of the administrative affairs of the individual Districts, subject to the terms of [the Joint Administrative Agreement] and to the directions of the Boards of Directors. . . ." (Ex. 120, ¶ 6, at p. 12) Thus, under the Joint Administrative Agreement, broad, executive powers were delegated to Mr. Parkhurst, the Chief Engineer, which included managing the District's response to the 1976 strike, and authorizing employee compensation — even if different from the Salary Resolution.[32] Appellants' arguments that the payment of overtime at time and one-half was unauthorized or improper, are therefore wholly lacking in merit.[33]

### C. The Superior Court's Award of Prejudgment Interest Must Be Affirmed.

Appellants attack the trial court's award of prejudgment interest on the basis that such interest ostensibly may not be awarded under Sections 3287(a) or 3288 of the Civil Code, unless damages are "certain, or capable of being made certain by calculation." Here, Appellants argue, there was a "substantial dispute as to the amount

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[32]Section 6522 of the Health & Safety Code permits the District to "do any act necessary or proper to the complete exercise and effect of any of its powers, or for the purposes for which it was formed." Clearly, this broad grant includes the power to do such acts necessary to operate the District's facilities during strikes and to delegate authority to the Chief Engineer to do the same.

[33]There is no indication as to why the trial court declined to include in the damage award the 10% bonus given to employees at the various landfills for work performed during the 1976 strike. Appellants' contention that the trial court did so decline because the 10% bonus was allegedly not in accord with the Salary Resolution is mere speculation. Appellants' Brief at 13. Although there was evidence that the 10% bonus was for, *inter alia*, hours actually worked (R.Tr. 987-88), the trial court could have concluded that this bonus, unlike overtime compensation, was not for hours worked.

of damages," Appellants' Brief at 28, and damages were, therefore, not capable of being made certain by calculation.

Notwithstanding Appellants' contentions, the award of prejudgment interest was clearly proper on at least two independent bases. First, the trial court had discretion in equity and under Section 3288 of the Civil Code to award interest regardless of whether the damages were liquidated. Second, while the District's *entitlement* to various portions of the damage award was (and is) disputed, each such portion has always been "capable of" calculable certainty.

**1. The Superior Court Properly Exercised Its Discretion to Award Prejudgment Interest.**

Appellants' first premise that the liquidation requirements of Section 3287(a) of the Civil Code must be satisfied before prejudgment interest may be awarded is incorrect. On the contrary, it has long been the rule that the court acting in equity may award prejudgment interest in its discretion, regardless of the certainty of the damages. As the court in *McCowen v. Pew,* 18 Cal. App. 482, 123 Pac. 354 (1912), stated over 70 years ago:

> "In equitable actions, it is true, the rule of law as to interest is generally followed; 'but interest is some times allowed by courts of equity in the exercise of a sound discretion, when it would not be recoverable at law.' "

18 Cal. App. at 485 (citation omitted); *followed in, Smith v. Rickards,* 149 Cal. App. 2d 648, 308 P.2d 758 (1957); *see also Bank of America v. Ryan,* 207 Cal. App. 2d 698, 710, 24 Cal. Rptr. 739 (1962) (Interest allowable on unliquidated funds held in constructive trust); *Gherman v. Colburn,* 72 Cal. App. 3d 544, 587, 140 Cal. Rptr. 330 (1977) ("The law is clear that the jury may award

interest even on an unliquidated sum against a joint venturer who has violated his fiduciary duties."). In the instant case, the trial court acting under its equitable "clean up" powers had discretion to award prejudgment interest.

This discretion has been recognized in Section 3288 of the Civil Code. This section, enacted in 1872, provides:

> "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury."

*Civil Code* § 3288 (West 1970). The trial court[34] also had discretion under the express language of Section 3288 to award prejudgment interest, regardless of whether the damages in this case were liquidated.

Appellants dispute this discretionary power on the basis of two unsupported premises. First, Appellants contend that the liquidation requirement of Section 3287(a) has been judicially engrafted onto Section 3288. Appellants secondly maintain that Section 3288 requires *both* a "breach of an obligation not arising from contract" *and* a finding of "oppression, fraud, or malice," before the trial court has discretion to award prejudgment interest. Neither of these propositions is correct.

The California Supreme Court has interpreted Section 3288 in *Bullis v. Security Pacific Nat'l Bank,* 21 Cal. 3d 801, 148 Cal. Rptr. 22, 582 P.2d 109 (1978). There the Court expressly held:

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[34]Although Section 3288 refers only to the jury's discretion, it also empowers the trial court, acting as a fact finder, to award discretionary interest. *See Redke v. Silvertrust,* 6 Cal. 3d 94, 106, 98 Cal. Rptr. 293, 490 P.2d 805 (1971), *cert. denied,* 405 U.S. 1041 (1972).

> "[E]ven if plaintiff's damages are not liquidated, prejudgment interest may be awarded."

21 Cal. 3d at 814 (citations omitted). Appellants attempt to counter this clear statement, with a facile misreading of the Supreme Court's subsequent decision in *Greater Westchester Homeowner's Ass'n v. City of Los Angeles*, 26 Cal. 3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329 (1979), *cert. denied*, 449 U.S. 820 (1980), arguing that the Court in *Greater Westchester* required damages of calculable certainty for an interest award under Section 3288.

This reading of *Greater Westchester* is patently incorrect. There, the Court actually stated:

> "We have recently affirmed [in *Bullis*] that, *unlike Civil Code section 3287, which relates to liquidated and contractual claims, section 3288 permits discretionary prejudgment interest for unliquidated tort claims.*"

26 Cal. 3d at 102 (emphasis added). The Court went on to hold that Section 3288 discretionary interest was intended to compensate a plaintiff for property loss and should not be awarded on intangible damages such as physical suffering or emotional distress.[35] One reason for distinguishing between these types of tort damage, the Court opined, was that the *interest* on an amount of property damage was more easily and accurately calculated than on damages for pain and suffering. *Greater Westchester* clearly does not, however, incorporate a liquidation requirement into Section 3288. *See also Levy-Zentner Co. v. Southern Pacific Transportation Co.*, 74 Cal. App. 3d 762, 796 & n. 28, 142 Cal. Rptr. 1 (1977)

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[35]In the instant case, damages are unquestionably pecuniary. The discretionary interest award does not, therefore, run afoul of *Bullis* or *Greater Westchester*.

(Distinction between Section 3287 and Section 3288 is whether damages are "readily ascertainable.")

The *Bullis* decision also disposes of Appellants' second claim. There, the Court stated:

> "It is clear from th[e] language [of Section 3288] that a party does not have to prove both a breach of a noncontractual obligation *and* oppression, fraud or malice."

21 Cal. 3d at 814 (citations omitted) (emphasis by the Court). Appellants cite *Southern Pacific Transportation Co. v. State,* 115 Cal. App. 3d 116, 122, 171 Cal. Rptr. 187, 191 (1981). There, the Court stated that an award of prejudgment interest under Section 3288, like exemplary damages under Section 3294 of the Civil Code, required oppression, fraud or malice. This statement is not correct law, however, as it directly conflicts with *Bullis*. Furthermore, a comparison of Section 3288 and 3294 reveals the fallacy of the *Southern Pacific* court's reading of Section 3288 and 3294.[36] *See Canavin v. Pacific Southwest Airlines,* 141 Cal. App. 3d 577, 594 n. 9 & 595, ____ Cal. Rptr. ____ (1983), *reh'g granted* (rejecting *Southern Pacific*).

In sum, Appellants' contention that either liquidation or malice, fraud, or oppression must be proved before the

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[36]Section 3294(a) reads in part:

> "In an action for the breach of an obligation not arising from contract, *where* the defendant has been guilty of oppression, fraud, or malice. . . ."

*Civil Code* § 3294 (West Supp. 1982) (emphasis added). As noted, Section 3288 provides:

> "In an action for the breach of an obligation not arising from contract, *and* in every case of oppression, fraud, or malice, . . ."

*Civil Code* § 3288 (West 1970) (emphasis added).

trier of fact may award prejudgment interest on tort damages is simply unsupported and incorrect.[37]

Further, the trial court properly exercised its discretion in awarding prejudgment interest. Appellants willfully and intentionally engaged in an illegal strike, and for eleven days blatantly ignored an injunction against this conduct. Under these circumstances, and considering that the District's loss was entirely pecuniary, the trial court's award of prejudgment interest was a proper exercise of its discretion.

**2. The Damages Awarded by the Superior Court Were Capable of Being Made Certain by Calculation.**

Assuming, *arguendo*, that the liquidation requirement of Section 3287(a) of the Civil Code must be met before prejudgment interest is appropriate, the damages awarded in this case clearly meet this standard. In this regard, Appellants confuse the certainty of *entitlement* to damages with the certainty of *amount* of damages. Section 3287(a) has never required the former, as the cases Appellants cite clearly established.

Appellants list several factors in their Brief which allegedly demonstrate the uncertainty of the damages in this case. Appellants' Brief at 28-29. Initially, those items listed as "offsets," *id.* at 28-29 (¶¶ 7-10), are irrelevant. The law is clear that even an unliquidated offset does not

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[37]Of course, Section 3287(a) may apply to damages not arising from breach of contract as well as to contract damages. Because interest is mandatory under Section 3287(a), but only discretionary under Section 3288, plaintiffs have occasionally sought prejudgment interest on tort damages under Section 3287 on appeal, where the trial court failed to award it. *See, e.g., Leff v. Gunther*, 33 Cal. 3d 508, 189 Cal. Rptr. 377, 658 P.2d 740 (1983); *Levy-Zentner Co. v. Southern Pacific Transportation Co., supra.* Liquidation must be shown to obtain prejudgment interest as of right under Section 3287(a), but is irrelevant to a discretionary award under Section 3288.

affect a plaintiff's right to prejudgment interest on the net recovery. *See Lineman v. Schmid,* 32 Cal. 2d 204, 212, 195 P.2d 408 (1948) and cases cited there; *Leaf v. Phil Rauch, Inc.*, 47 Cal. App. 3d 371, 120 Cal. Rptr. 749 (1975).

Several other items on this list detail the various calculations which have been made over the course of the litigation, which have resulted in divergent totals for the amount of damages. *E.g.,* Appellants' Brief at 28 (¶¶ 3-6). This divergence is, however, merely a function of the fact that the "total" damage award includes scores of component items. Appellants have disputed only *entitlement* to individual components. Thus, the factual resolution in this case was only whether a particular component of damage or of offset was "in or out" of the total. This type of mechanical computation is precisely the certainty intended in Section 3287(a). *See Leff v. Gunther, supra.*

The other items in Appellants' list are similarly irrelevant. The fact that the damage total has been recalculated and adjusted or that the damage award is less than the original claim, does not preclude an award of prejudgment interest. *Coleman Engineering Co. v. North American Aviation,* 65 Cal. 2d 396, 55 Cal. Rptr. 1, 420 P.2d 713 (1966). Similarly, the alleged requirement that the District must have supplied a correct calculation of the total damage claim and underlying data before interest could begin to accrue, is not supported by relevant precedent. The cases Appellants cite for this proposition involve disputes respecting the value of property or services[38] In those cases, the courts occasionally required the plaintiff to support his valuation with data if such was not readily accessible to the defendant, before interest began to

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[38]Even where value of services or property is disputed, if it is calculable from fair market value, the provisions of Section 3287 apply. *See e.g., Executive Aviation, Inc. v. National Insurance Underwriters,* 16 Cal. App. 3d 799, 94 Cal. Rptr. 347 (1971).

accrue. Certainly, however, there is no requirement to be gleaned from these cases that documentation must be supplied if the value of the services or property, in the instant case the value of employee services, guard services and various strike-related expenditures, is undisputed.

The trial court properly awarded prejudgment interest both as a matter of sound discretion and as a matter of law. This interest award must therefore be upheld.

## IV.

## CONCLUSION.

In summation, the trial court's findings of fact are supported by substantial evidence. The trial court's conclusions of law are in accord with dispositive statutes and judicial precedent. Appellants raise no argument that the trial court's evidentiary or discretionary rulings were in error. The judgment must therefore be affirmed in all respects.

Los Angeles, California.
Dated: June 27, 1983.

Respectfully submitted,

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# APPENDIX C

APPENDIX C

2ND CIVIL NO.

**66088**

# In the Supreme Court of the State of California

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, a public agency,
*Plaintiff and Respondent,*

vs.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; VICTOR N. HOCHEE, HARRY GLUCK, JACK ROBERTS, ANTHONY BUTKA, EUGENE MILLER, GARY SCHALANDER, BILLY MANNING,
*Defendants and Appellants.*

**Appeal from the Superior Court of Los Angeles County.**
**Hon. Charles H. Older, Judge**

## PETITION FOR HEARING

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and
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IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, a public agency,
*Plaintiff and Respondent,*

vs.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; VICTOR N. HOCHEE, HARRY GLUCK, JACK ROBERTS, ANTHONY BUTKA, EUGENE MILLER, GARY SCHALANDER, BILLY MANNING,
*Defendants and Appellants.*

## PETITION FOR HEARING

*To the Honorable Rose E. Bird, Chief Justice, and the Honorable Associate Justices of the Supreme Court of California:*

Petitioners Los Angeles County Employees Association, Local 660, Service Employees International Union, AFL-CIO, Victor N. Hochee, Harry Gluck, and Jack Roberts hereby respectfully petition this Court for a hearing following the decision of the Court of Appeal, Second Appellate District, Division Two, filed on October 12, 1983, and attached hereto as Appendix "A". On November 2, 1983, the Court of Appeal modified the decision. A copy of the modification is attached hereto as Appendix "B".

## I.

## PRELIMINARY STATEMENT.

Los Angeles County Employees Association, Local 660, Service Employees International Union, AFL-CIO (Union) is the certified bargaining representative of the blue collar employees employed by the County Sanitation District (District). The District is a local public agency covered by the Meyers-Milias-Brown Act (MMBA), Government Code Sections 3500, *et seq.* On July 5, 1976, the employees of the district commenced a strike which was in effect until July 12, 1976. Upon the commencement of the strike, the District filed a Complaint for Injunction and Damages, and was granted a Temporary Restraining Order. Subsequently, an Order to Show Cause Re Contempt was filed and a hearing was set for July 27, 1976. After the strike was settled, the Union and the District entered into a stipulation that the strike was in effect for three separate days, and a fine in the amount of $1,500.00 was assessed by the Superior Court. The District filed an Amended Complaint on June 12, 1979 amending the Prayer for Damages on the Second Cause of Action. A trial was held before the Superior Court from March 18, 1981 to April 6, 1981. The Superior Court held that the strike was a public employee strike and was therefore unlawful, and that the Union was liable for damages, and assessed compensatory damages against the Union and three staff employees in the amount of $246,904.00 with pre-judgment interest. The Court of Appeal upheld liability as a tort under *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977), 72 Cal.App.3d 100. However, the Court of Appeal reduced the damages to $163,814.00, holding that the Superior Court had erred in allowing damages at time and a half pay for management, executive and professional employees where the District's Salary Ordinance required straight time only for overtime

work for such employees. The Court of Appeal held that to prohibit such a strike and allow damages was not violative of the constitutional rights of the Union or the employees. Further, the Court of Appeal held that a claim that the District had committed unfair bargaining practices under the MMBA was not a defense to liability. The Court of Appeal upheld the Superior Court in allowing damages for overtime paid to the management, executive and professional employees for 24 hours each day for the period of the strike, including pay for sleeping, eating, and driving to and from restaurants, etc., and rejected the Union's position that such staffing and payments were unreasonable and that there were no reasonable efforts to mitigate damages. The Court of Appeal also upheld the granting of pre-judgment interest.

## II.

## SUMMARY OF REASONS WHY THE PETITION FOR HEARING SHOULD BE GRANTED.

### A. The Supreme Court Has Not Decided the Issue as to the Legality of a Public Employee Strike and Tort Liability.

This case presents issues of extreme importance to public sector labor-management relations, namely whether a public employee union and the employees of a local public agency have the right to engage in a peaceful strike by withholding services and to engage in peaceful picketing. Further, if such a strike and picketing occur, whether the Union and its staff employees are liable for damages as a tort.

The various Courts of Appeal have held that public employees are denied the right to strike and picket, and if such conduct does occur, then the Superior Court, under

the California common law, can, on a *per se* basis, issue an injunction and/or grant damages. (Appendix "A", p. 5.) However, in many of such cases, including the instant case, the Courts of Appeal have stated that the Supreme Court has not made a clear and definitive ruling on the legality of public employee strikes, and that in the absence of such a Supreme Court decision, the Court of Appeal is obligated to hold that a strike by public employees in local government is unlawful and therefore is a tort, and that damages may properly be assessed against a union and its staff employees.[1]

In *El Rancho Unified School District v. National Education Association* (1983), 180 Cal.Rptr. 809, 815, the Court of Appeal stated:

> "If the well-settled rule denying public employees the right to strike no longer represents the view of our Supreme Court, it is the province of that court to say so. Its declination in *San Diego* to pass on the question adds nothing to its earlier decision similarly declining to resolve the question."[2]

In *People ex rel. State of California, Seal Beach Police Officers Assn. v. City of Seal Beach* (1983), 146 Cal.App.3d 1099, 1103, the Court of Appeal, in holding that the city had violated the MMBA by failing to meet and confer in good faith with the Police Officers Association prior to

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[1]Although not an issue in this case, the logical result would be that each of the striking employees would also be subject to tort liability and personal damages.

[2]The Supreme Court granted a hearing in *El Rancho* and held that the Superior Court did not have jurisdiction to grant damages, as the subject matter and any remedy were within the jurisdiction of the Public Employment Relations Board. *El Rancho Unified Sch. Dist. v. National Education Assn.* (1983), 33 Cal.3d 946. The legality of public employee strikes was not addressed.

adopting certain charter amendments, stated in footnote 1:

> "The [union does] not call upon the court to consider whether public employees have a right to strike. Therefore we express no opinion on this issue. However, we do note, contrary to the City's assertion, it is not 'well settled' that public employees have no right to strike. (See *International Brotherhood of Electrical Workers v. City of Gridley* (1983), 34 Cal.3d 191.)"

In *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers, supra,* the Court of Appeal stated:

> "There is no square holding of our Supreme Court passing upon the legality of strikes by public employees. . . . " 72 Cal.App.3d at 105.

In the instant case, the Court of Appeal stated:

> "While we recognize that often 'coming events cast their shadows before' and certain expressions and decisions such as *International Brotherhood of Electrical Workers v. City of Gridley, supra,* 34 Cal.3d 191, 199, fn. 7; *El Rancho Unified School Dist. v. National Education Association, supra,* 33 Cal.3d 946, 957, 958, 962-964; *San Diego Teachers Association v. Superior Court, supra,* 24 Cal.3d 1, 6-7, 13; and *City and County of San Francisco v. Cooper, supra,* 13 Cal.3d 898, 912, may have prophetic value, as an intermediate appellate court we remain bound by the presently well-settled rules that deny employees the right to strike and which subject those who do engage in such unlawful practices to tort actions for damages. If these rules should no longer represent the considered view of our Supreme Court, it is the exclusive province of that body to so declare." (Appeals "A", p. 9.)

This Court has repeatedly stated that the question of the legality of public employee strikes is an open issue in California.

Commencing with *In re Barry* (1968), 68 Cal.2d 137, 151, the Court stated that it was expressing no opinion on "the question whether strikes by public employees can be lawfully enjoined". This issue was also held open in *City and County of San Francisco v. Cooper* (1975), 13 Cal.3d 898, at p. 912, where the Court stated, "We have no occasion to resolve this controversy in the present action . . ." In *San Diego Teachers Assn. v. Superior Court* (1979), 24 Cal.3d 1 at p. 7, the Court stated:

> "Similarly, it is unnecessary here to resolve the question of the legality of public employee strikes if the injunctive remedies were improper because of the District's failure to exhaust its administrative remedies under the EERA."

Justice Richardson, dissenting in *San Diego Teachers Association, supra,* stated that for the Supreme Court to leave the question of the legality of public employee strikes open was contrary to the longstanding and numerous Court of Appeal cases, as well as *Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen* (1960), 54 Cal.2d 684.

In *El Rancho Unified School District, supra,* the Supreme Court again found it unnecessary to pass on this issue. However, in concurring opinions by Justices Richardson and Grodin, the issue of the legality of public employee strikes was strongly debated. justice Richardson expressed some dismay that the Court did not decide this issue, and stated:

> "This Court should no longer continue its hesitant, tentative ritual dance around the parameter of the

central legal principal, but honestly, openly and forthrightly enforce it . . ." 33 Cal.3d at 962.

Justice Grodin, in an equally emphatic concurring opinion, stated that the question of the legality of public employee strikes is not that resolved and clear, as was urged by Justice Richardson. Justice Grodin presented an analysis that since the developments regarding public employee collective bargaining, the passage of the MMBA, and the numerous decisions interpreting the MMBA as providing a state-mandated collective bargaining system, the ". . . original policy foundation for the 'rule' that public employee strikes are illegal in this state has been substantially undermined, if not obliterated." 33 Cal.3d at 963-964.

In *International Brotherhood of Electrical Workers v. City of Gridley,* 34 Cal.3d 191, 210, Justice Richardson, in a concurring and dissenting opinion, again repeated that in his opinion, "[p]ublic employee strikes are illegal [and] [t]hey cannot and should not be condoned." He urged the majority of the Supreme Court to acknowledge and decide on his point of view, stating, "My colleagues should forthrightly, clearly and unmistakably acknowledge this."[3]

This Court should grant a hearing in view of the fact that public employee strikes in California under the MMBA have taken place and will reoccur in the future. Since the Supreme Court has expressly reserved a decision on this issue and in view of the candid invitation by the Courts of Appeal for a ruling by the Supreme Court, Petitioners submit that this case, which provides a de-

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[3]Although Petitioners respectfully disagree with the conclusion sought by Justice Richardson, his statements strongly suggest that this issue should be decided by the Supreme Court.

tailed record of the collective bargaining process in local government under the MMBA, resulting in a substantial damage award, presents the Supreme Court with compelling reasons to grant a hearing.

### B. Damages Against the Union and Employees Under the California Common Law Are Inconsistent With the *Cooper* Case.

The Supreme Court in *City and County of San Francisco v. Cooper, supra,* held that a settlement agreement between the unions representing city and county and school employees and the public employers were legally enforceable under the MMBA,[4] even though the settlement resulted from a public employee strike. The Supreme Court did not rule on the legality of the strike, but held that the Superior Court had no right to go beyond the legislative determination of the public employer to agree to the settlement arising out of the strike. The result of the *Cooper* case is totally inconsistent with the law as applied by the Court of Appeal in this case. In *Cooper*, the public employees went on strike because of what in their opinion constituted an inadequate salary increase offer by the City and County of San Francisco and the school district. The strike settlement provided for the public employers to pay additional salaries beyond the amounts that were offered at the commencement of the strike, resulting in millions of dollars of increased cost to the City, County and school district. If the Court of Appeal decision in this case is allowed to stand, then the

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[4]The school district in *Cooper*, at the time of the strike, was subject to the Winton Act (Education Code 1959, Section 13080), superseded by EERA (Government Code Sections 3540-3549), which provides for a collective bargaining system for school employees. The City and County of San Francisco was and is presently covered by the MMBA.

result is that a public entity, following a strike, may enter into a settlement that provides increases in salaries and fringe benefits to the striking employees, and such increased salaries and fringe benefits will be lawful and legally enforceable under *Cooper*, but the public agency could then sue the union, its staff employees, and presumably its own employees who were on strike, to recover, as damages, the amount of the increased salaries paid as a result of the strike.[5]

### C. The Court of Appeal Decision Is Contrary to a Modern Industrial Society Under the California Common Law and the Meyers-Milias-Brown Act, Where Public Employees Are Organized and Represented by Unions and Negotiate on Wages and Conditions of Employment With Local Governments and Engage in Strikes as Part of the Collective Bargaining Process.

A common law that provides for *per se* tort liability and damages is inconsistent with the MMBA. The MMBA provides a comprehensive state-mandated process to resolve labor disputes in cities, counties and districts in California through collective bargaining. A damage award based on a non-statutory common law tort frustrates the purposes of the state legislation.

The issue of the legality of a public employee strike and tort liability presents social and economic matters of great importance to the hundreds of thousands of employees of cities, counties and districts in California, where the imposition of damages can cause a crippling financial

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[5]Technical defenses could be asserted, such as that the settlement agreement constituted a waiver or release, but the practical result is that there are damages to the public employer based on the strike, and without an express release, a cause of action for damages remains as a potential lawsuit.

effect on a union, the union staff employees, and individual employees.[6] A *per se* prohibition resulting in tort liability should not be imposed by the courts, but is within the province of the Legislature only.[7]

### D. The Court of Appeal Decision Is Not Compatible With the Trend of Recent Supreme Court Cases on Public Employee Strikes.

In *In re Berry, supra,* the Supreme Court reversed a Superior Court issuance of a broad, all-encompassing injunction against picketing by a union resulting from a public employee strike against a local public agency.

In *Cooper, supra,* the Supreme Court held that a settlement agreement providing wage increases that resulted from a public employee strike was lawful and enforceable under the MMBA.

In *San Diego Teacher Assn., supra,* the Supreme Court held that the Superior Court did not have jurisdiction to enjoin a teachers' strike against a school district as the subject matter and remedies were within the exclusive jurisdiction of the Public Employment Relations Board.

In *El Rancho, supra,* the Supreme Court held that the rule of *San Diego Teachers Assn., supra,* also applied to a

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[6]It is estimated that there are over 1,000,000 public employees in the State of California, and in 1979 there were 79 strikes by public employees against the state and local governments, involving 39,076 employees, resulting in 602,408 idle man-days. In 1980, there were 46 public employee strikes in California, involving 20,045 employees, resulting in 160,474 idle man-days. (*California Public Employee Relations* No. 48, March, 1981.)

[7]The MMBA does not prohibit strikes. However, the Legislature expressly prohibited strikes by fire fighters under Labor Code Section 1962. See *Cooper, supra,* at 912, n. 5.

claim for damages by a school district arising out of a teachers' strike.

In *IBEW v. City of Gridley, supra,* the Supreme Court held that the city, under the MMBA, could not revoke the union's certification as the bargaining representative due to the union's strike against the city.

A consistent, logical and realistic rule of law in order to accommodate a modern common law with the state legislation of the MMBA is that there is no *per se* tort. The Superior Court can enjoin, as a matter of equitable jurisdiction, a public employee strike that threatens the health and safety of the public. However, a tort allowing damages is not in the same category or necessary to safeguard the public interest. Where an injunction is permissible based on health and safety, the contempt powers of the court are formidable in enforcing the court order. Under the Court of Appeal decision, the Superior Court, without any findings on the nature of or reason for the strike, can impose damages, which makes the court a substantial supporter of the employer in the collective bargaining process and severely upsets the collective bargaining process of the MMBA.

**E. The Court of Appeal Was in Error in Holding That There Cannot Be a Defense on Whether the District Engaged in Unfair Bargaining and Therefore Violated the Meyers-Milias-Brown Act.**

See concurring opinion of Justice Reynoso in *Stationary Engineers v. San Juan Suburban Water District* (1979), 90 Cal.App.3d 796, 801.

**F. The Court of Appeal Was in Error in Holding That the Granting of Damages Arising Out of a Public Employee Strike Is Not a Violation of the Constitutional Rights of Free Speech and Association and the Guarantee of Equal Protection of the Law for the Union and Its Members.**

The Court of Appeal cites *Pasadena Unified School District, supra,* and *Los Angeles Unified School District v. United Teachers,* 24 Cal.App.3d 142, 144-146 (disapproved in *City and County of San Francisco v. Cooper, supra); City of San Diego v. American Federation of State, etc. Employees* (1970), 8 Cal.App.3d 308), for a summary rejection of the constitutional issues urged by Petitioners. The Supreme Court has not decided such important constitutional questions.

**G. The Superior Court Committed Reversible Error in Allowing Excessive Overtime Pay by 24-Hour Assignments.**

The District paid overtime to management, executive and professional employees for time spent on a 24-hour basis. The Superior Court did not require the District to follow any reasonable rule on damages or take any reasonable care to minimize losses or mitigate damages. The District arbitrarily assigned such highly paid employees to be stationed at the various district sites on a 24-hour basis, where no work was required or necessary, and paid such employees for the full 24 hours, with overtime after 8 hours, which included overtime for reading, sleeping, recreation, walking around, driving to and from restaurants, and eating meals, etc.

### H. The Court of Appeal Was in Error in Allowing Pre-Judgment Interest.

The Superior Court granted pre-judgment interest even though the amount was not certain or capable of calculation and was subject to a judicial determination. The Complaint did not specify the amount of damages until an amendment was filed some three years after the filing of the original Complaint. Throughout the trial, the District claimed additional damages and resisted certain offsets urged by Petitioners. The granting of pre-judgment interest is contrary to the rule that an award of pre-judgment interest must be based on the essential element that there was a certainty of the amount or capability of certainty, and not subject to judicial determination.

## III.

## ARGUMENT.

### A. The Common Law Rule on Public Employee Strikes and Damages Must Require Recognition of a Modern Society With Collective Bargaining in Public Employment Under State Legislation.

In *Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen* (1960), 54 Cal.2d 684, the Supreme Court stated that "[i]n the absence of legislative authorization public employees in general do not have the right to strike . . ." 54 Cal.2d at 687. This pronouncement — albeit dictum[8] — has been treated by the Courts of Appeal as establishing a California "common law rule" that public employee strikes, absent an authorizing stat-

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[8]The Court in *Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen, supra,* found the Los Angeles Metropolitan Transit Authority Act to authorize strikes by employees of that agency.

ute, are *per se* illegal. (See Appendix "A", p. 5. *See also Stationary Engineers v. San Juan Suburban Water Dist.* (1970), 90 Cal.App.3d 796, 801; *Pasadena Unified Sch. Dist. v. Pasadena Fed. of Teachers, supra; City of San Diego v. American Federation of State, etc. Employees, supra; Almond v. County of Sacramento* (1969), 276 Cal.App.2d 32, 35-36.)

This Court should examine this accepted doctrine of the Courts of Appeal and declare that the common law rule is that in the absence of a specific legislative prohibition, public employees are not *per se* violating some undefined and unspecified law when they engage in a strike, and that such a strike can be enjoined only if the public employer demonstrates that the strike presents a clear and present danger to the health and safety of the public.

**1. The Supreme Court Can and Has Formulated the Common Law When an Accepted Doctrine is Outdated and Inconsistent With Modern Society.**

The Supreme Court has long recognized the necessity to redefine, modify, change, or even abolish, a common law rule "when reason or equity demand it" or when the rule is considered "unjust" in light of the needs of modern society. *Rodriguez v. Bethlehem Steel Corp.* (1974), 12 Cal.3d 382, 394 (Court abrogated common law rule prohibiting a spouse from recovering for loss of consortium and established a new rule allowing a spouse to maintain such a cause of action); *Muskopf v. Corning Hospital District* (1961), 55 Cal.2d 211, 213 (Court abolished common law rule of governmental immunity). See also *Li v. Yellow Cab Co.* (1975), 13 Cal.3d 804 (Court abolished common law rule of contributory negligence and established a new rule of comparative negligence); *Green v. Superior Court* (1974), 10 Cal.3d 616 (Court f

changed common law rule that landlord under no duty to maintain leased dwellings in habitable condition during the term of the lease); *People v. Pierce* (1964), 61 Cal.2d 879 (Court changed common law rule regarding spousal immunity from prosecution for conspiracy); *Malloy v. Thong* (1951), 37 Cal.2d 356 (Court abolished common law rule of tort immunity for charitable institutions).

In *Rodriguez,* the Court enunciated in the clearest terms the Supreme Court's role in insuring the just and rational development of the common law in California:

> "The nature of the common law requires that each time a rule of law is applied, it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice. Whenever an old rule is found unsuited to present conditions or unsound, it should be set aside and a rule declared which is in harmony with those conditions and meets the demands of justice." 12 Cal.3d at 394.

See also *Butcher v. Superior Court* (1983), 139 Cal.App.3d 58, 64, where the Court of Appeal extended the new common law rule enunciated in *Rodriguez* to allow unmarried cohabitants to maintain an action for loss of consortium. The Court of Appeal stated:

> "When it is determined that the common law of judge-made law is unjust or out of step with the times, we should have no reluctance to change it. [Citation omitted.] The law is not, nor should it be, static. It must keep pace with changes in our society since it was never intended for the doctrine of *stare decisis* to be cast in iron. [Citation omitted.]"

The rule of the Court of Appeal that public employees do not have any right to strike at any time or in any

situation was judicially created. And, just as the aforementioned common law rules were either discarded or changed because they were "unjust" or "equity demanded it", a common law rule on public employee strikes should be carefully formulated, consistent with the state legislation and the realities of public employment.

**2. Public Policy Dictates That There Should Be No Per Se Prohibition Against All Public Employee Strikes as the Rationales Advanced for Prohibiting All Strikes by Public Employees Are No Longer Logically or Legally Supportable.**

The last two decades have seen a drastic change in judicial and scholastic attitudes toward the rights of public employees to bargain collectively and to strike in support of their demands. As Hugh B. Jascourt, Labor Relations Editor of the Journal of Law and Education, observed, "The current trend — both intellectual and statutory — is to permit a 'limited' right to strike by public employees, . . ." Jascourt, "Limited Right to Strike Laws — Can they Work When Applied to Public Education? An Overview", 2 J. Law and Educ. 673 (1973). Several states explicitly permit strikes by certain public employees,[9] and other states, through their highest

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[9] *Alaska.* Alaska Stat. Section 23.40.200. (Courts limited to enjoin a strike by employees if the strike "has begun to threaten the health, safety and welfare of the public.") *Hawaii.* Hawaii Rev. Stat. Section 89-12. *Minnesota.* Minn. Stat. Ann. Section 179.64. *Montana.* Mont. Code Ann. Section 39-31-201. (No specific legislative provision granting public employees the right to strike; however, in *State ex rel. Department of Highways v. Public Employees Craft Council* (1974), 165 Mont. 349, 352, 529 P.2d 785, 788, the Court interpreted the legislative declaration authorizing public employees to bargain collectively to include a right to strike.) *Oregon.* Or. Rev. Stat. Section 243.736. (Law permits public employer to seek to enjoin otherwise legal strike only if "a court finds that the strike creates a clear and

courts, implicitly allow public employee strikes.[10] Additionally, an increasing number of commentators and commissions have recommended that public employees be granted the right to strike. As the Court of Appeal in the instant case noted (Appendix "A", p. 5), one such commission, the California Assembly Advisory Council on Public Employee Relations, in its final report of March

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present danger or threat to the health, safety and welfare of the public.") *Pennsylvania.* Pa. Stat. Ann. Title 43, Sec. 1101.1001. (Strikes by public employees are permitted "unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public.") *Vermont.* Vt. Stat. Ann. Title 3, Section 903. (State employees prohibited from striking; however, municipal employees are allowed to strike.) See also 2 A.B.A. Section Labor Rel. L. Committee Reports, State and Local Government Bargaining, 389 (1978), 862 Gov't. Empl. Rel. Rep. (BNA) 17 (May 19, 1980). In 1983, *Illinois* and *Ohio* enacted legislation permitting public employee strikes except for security personnel and essential services. Government Employee Relations Report, Vol. 21, No. 1032, pp. 1955 and 1961 (October 3, 1983).

[10]In *Holland School Dist. v. Holland Educ. Ass'n.* (1968), 380 Mich. 314, 157 N.W.2d 206, the Court declared a teachers' strike illegal, but refused to grant an injunction, stating that "It is basically contrary to public policy . . . to issue injunctions in labor disputes absent a showing of violence, irreparable injury or breach of the peace." *Id.,* at 326, 157 N.W.2d 210. Similarly, in *Timberlane Regional School Dist. v. Timberlane Regional Educ. Ass'n.* (1974), 114 N.H. 245, 317 A.2d 555, the Court held that, "In deciding to withhold an injunction the trial court may properly consider . . . whether recognized methods of settlement have failed, whether negotiations have been conducted in good faith, and whether the public health, safety and welfare will be substantially harmed if the strike is allowed to continue." *Id.,* at 251, 317 A.2d at 559. Other cases withholding remedies for allegedly illegal strikes include: *School Comm. of Westerly v. Westerly Teachers Ass'n.* (1973), 111 R.I. 96, 299 A.2d 441; *School Dist. No. 351 of Oneida County v. Oneida Educ. Association* (1977), 98 Idaho 486, 57 P.2d 830; *Local 266, International Brotherhood of Electrical Workers v. Salt River Project Agriculture Improvement and Power District* (1954), 78 Ariz. 30, 275 P.2d 393.

15, 1973, concluded (at p. 24) that, "[s]ubject only to [certain specified] restrictions and limitations . . . public employees should have the right to strike."[11] The issue has been the subject of many writers and experts in the field of public labor relations.[12]

One of the earliest cases of the Court of Appeal on public employee collective bargaining was *Nutter v. City of Santa Monica* (1946), 74 Cal.App.2d 292, which was pre-MMBA and held that Labor Code Section 923 was a legislative grant of authority for collective bargaining in the private sector, but was not applicable to public employees. *City of Los Angeles v. L.A. etc. Council* (1949), 94 Cal.App.2d 36, followed, on the issue of public employee strikes. *City of San Diego v. AFSCME, supra,* following *Almond v. County of Sacramento, supra,* held, that under the common law, a public employee strike was unlawful. Finally, in *Pasadena Unified Sch. Dist.,* the Court held that since a public employee strike is unlawful under the common law, then it follows that there is tort liability for damages. The other Courts of Appeal decisions have restated the same rule as accepted law. Therefore, it is necessary to reexamine the underlying public policy is-

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[11]Much of the current enlightened view regarding public employee strikes owes its genesis to a report made by a Pennsylvania commission in 1968. This commission extensively studied the matter of public sector employee relations and concluded: "[W]here collective bargaining procedures have been exhausted and public health, safety or welfare is not endangered, it is inequitable and unwise to prohibit strikes." Report and Recommendation of the Governor's Commission to Revise the Public Employee Law of Pennsylvania (June 1968), at p. 13, quoted in Jascourt, "Limited Right to Strike Laws . . .", *supra,* 2 J. Law and Educ. 673 at 674-675.

[12]Many of such articles are set forth in Appendix "A", p. 3. See also articles cited in *El Rancho Unified Sch. Dist. v. Nat'l Ass'n., supra,* at p. 965 (Grodin, J., concurring).

sues that formed the rationale or the stated so-called common law rule.

The holding that there is a common law rule that a public employee strike is *per se* illegal continues to be followed by the Courts of Appeal, based primarily on a number of outmoded policy reasons. Those arguments are summarized as follows: (1) sovereignty — the concept that public employee strikes are denial of the authority of government, (2) improper delegation of legislative authority — to permit public employee strikes as part of collective bargaining would give a union unacceptable bargaining power and would therefore distort the legislative process, (3) essentiality — public services are essential and therefore may not be interrupted, and (4) the terms of employment are not subject to bilateral collective bargaining because they are set by the legislative body through unilateral lawmaking.

An examination of these policy arguments reveals that they are essentially not valid or realistic. The first argument — that one cannot strike against the sovereign — has found almost no support in recent years.[13] See *Note,* "Private Damage Actions Against Public Sector Unions for Illegal Strikes," 91 Harv.L.Rev. 1309, 1314-1315 (1978). Commentator Harry T. Edwards[14] has summarized much of the critique of the sovereignty argument as follows:

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[13]*Nutter v. City of Santa Monica, supra,* is an early California case to rely on the sovereignty argument. See also, *City of Manchester v. Manchester Teachers Guild* (1957), 131 A.2d 59, 61 (New Hampshire).

[14]Currently a justice of the United States Court of Appeals for the District of Columbia.

"It is clear, however, that sovereignty is no longer an adequate answer to public sector problems. For one thing, the idea of sovereignty is too vague; it offers little if any guidance as to the conduct of labor relations. The doctrine of sovereign authority historically has rested on the assumption that 'The King can do no wrong'. This notion found favor in early American legal precedent, especially in cases claiming tort liability against governmental units. Recent years, however, have seen the comfortable consensus on this question fade into the uncomfortable realm of reconsideration and debate. The sovereignty theory, as applied to public sector labor relations, thus begs the question.

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Moreover, the application of the strict sovereignty notion — that governmental power can never be opposed by employee organizations — is clearly a vestige from another era, an era of unexpanded government when its proprietary role was not nearly so important . . . With the rapid growth of the government, both in sheer size as well as in terms of assuming services not traditionally associated with the "sovereign", government employees understandably no longer feel constrained by a notion that 'The King can do no wrong'. The distraught cries by public unions of disparate treatment merely reflect the fact that, for all intents and purposes, public employees occupy essentially the same position vis a vis the employer as their private counterparts." Edwards, "The Development Labor Relations Law in the Public Sector", 10 Duq.L.Rev. 357, 359-360 (1972).

In *Anderson Federation of Teachers, Local 519 v. School City of Anderson* (1969), 252 Ind. 558, 568, 251 N.E.2d 15, 20, Chief Justice DeBrueler, dissenting, noted with respect to the sovereignty argument:

> "This is not a rational argument at all but a technique for avoiding dealing with the merits of the issue. This argument indicates a limitation in the thinker not attributable to the subject matter. In the case of a peaceful strike and no major disruption of the community, I find it very easy to think of a strike against the sovereign *and* to justify it. In fact, I find it unthinkable that any sovereign worthy of the name would strive to remain insulated from all pressures to act fairly and decently, without arbitrariness, towards its employees. The conflict of real social forces cannot be solved by the invocation of magical phrases like 'sovereignty'."

In recent years, sovereign immunity in tort law has been judicially abolished in many states. In California, the death knell came in *Muskopf v. Corning Hospital Dist., supra,* where the Supreme Court stated that, "[t]he rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia." 55 Cal.2d at 216. As noted by the Court in *Moskopf,* perpetration of the doctrine of sovereign immunity in tort law led to many inequities, and its application effect many incongruous results. Similarly, the doctrine that prohibits employees of a local government employer the right to strike on the basis that such strikes are a denial of the authority of government is a doctrine that is archaic and inconsistent with modern society. See *School Comm. of Westerly v. Westerly Teachers Ass'n.* (1973), 299 A.2d 441, 449 (Roberts, C.J., dissenting).

The second argument made against public employee strikes is that to permit public employees to engage in such activity would be an improper delegation of legislative authority to set the wages and terms and conditions of public employment. It is argued that the right to strike distorts the democratic political process because a strong public employee union would be able, by collective power, to wrest concessions from government to the detriment of the public welfare.

This argument has already been considered and flatly rejected by the Supreme Court in *Los Angeles Met. Transity Authority v. Brotherhood of Railroad Trainmen, supra,* where the Court concluded:

> "Permitting employees to strike does *not* delegate to them authority to fix their own wages to the exclusion of the employer's discretion. In collective bargaining negotiations, whether or not the employees strike, the employer is free to reject demands if he determines that they are unacceptable . . ." 54 Cal.2d at 693.

Moreover, the argument that the availability of a strike for public employees would give public sector unions unacceptable bargaining power is factually unsupportable. The public's concern over tax increases acts as a natural limit on the demands of public employee unions. As explained by Professor Edwards:

> ". . . [T]here *is* a natural limit to the public sector union's demands. The limit is imposed by the public itself. It is reached when the union's demands are exposed and are outrageous enough to raise public anger to the point where the public is not willing to accede to them." (Emphasis in original.) Edwards, "The Developing Labor Relations Law in the Public Sector", 10 Duq.L.Rev. 357 at 363 (1972).

The result of the strike in the instant case illustrates the fallacy of the argument that, if given the right to strike, a public sector union would wield excessive bargaining power. During the strike, negotiations resumed, and the parties reached an agreement on a new Memorandum of Understanding, the terms of which were the same as the District's last offer prior to commencement of the strike. (See Exhibits 182, 335; R.Tr.: 629, 1258.)[15] Clearly, the strike in the instant case did not cause the District to capitulate to the Union's demands.

A third argument made against permitting public employees to strike is the assertion that governmental services are essential and that there are no alternative sources of such services available to the consumer, and that, therefore, interruption of such services is not acceptable. The clear and most persuasive response is that the essentiality of the services does not depend on whether the employer is public or private. Chief Justice DeBrueler, dissenting, in *Anderson Federation of Teachers, Local 519 v. School City of Anderson, supra,* observed that:

> "There is no difference in impact on the community between a strike by employees of a public utility and employees of a private utility; nor between employees of a municipal bus company and a privately owned bus company; nor between public school teachers and parochial school teachers. The form of ownership and management of the enterprise does not determine the amount of destruction caused by a strike of the employees of that enterprise. In addition, the form of ownership that is actually employed is often a politi-

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[15]Reference to the Reporter's Transcript will be made by "R.Tr." and the page number, and to the Clerk's Transcript by "C.Tr." and the page number.

cal and historical accident, subject to future change by political forces. Services that were once rendered by public enterprise may be contracted out to private enterprise, and then by another administration returned to the public sector." 251 N.E.2d at 21.[16]

No intellectually sound argument can be made that the harm to the public is significantly greater in *every* public employee strike than it is in *any* private sector strike. It is the nature of the service provided that determines the impact of its interruption upon the public, not whether the service is provided publicly or privately. Only if it could be shown that each and every service provided by the public sector is absolutely essential to public h[illegible]

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[16]Recently, the United States Supreme Court, in *United Transportation Union v. Long Island Railroad* (1982), 455 U.S. 678, held that employees of a formerly private railroad recently acquired by a governmental entity retained their right to strike under the Railway Labor Act. The U.S. Supreme Court found that the public acquisition did not change the character of the service provided by the railroad Thus, the public railroad employees continue to enjoy a right to strike notwithstanding their public employment status. This case marks a departure from the U.S. Supreme Court's earlier holding in *United States v. United Mineworkers* (1947), 330 U.S. 258, where the Court held that the United States' seizure of a private coal mine transformed the coal mine operation from a private to a public enterprise. The Court then approved the issuance of an injunction against the striking union, a remedy that would not have been available had the employer been a private enterprise. In *United Transportation Union*, however, the U.S. Supreme Court recognized that the circumstance of public intervention need not necessarily alter the rights of employees. Although the *United Transportation Union* decision rested on the Supremacy Clause of the U.S. Constitution, the Supreme Court implicitly held that the railroad became no more essential after its public acquisition than it was when privately operated. The case thus represents a significant departure from the Court's earlier holding in *United Mineworkers* that a service becomes essential when it comes under government control.

and safety, and further that its interruption would cause more hardship to the public than the interruption caused by any strike in the private sector, could the absolute prohibition against all public employee strikes be logically supported. There simply is no empirical support for such a proposition. The fact is that in many instances, strikes by private employees pose a more serious threat to the public interest than would many of those engaged in by public employees.[17] As stated by Chief Justice Roberts, dissenting, in *Westerly School Comm. v. Westerly Teachers Association, supra:*

> "It is elementary that the services performed by people employed in the private sector are in many instances so essential to the orderly operation of society that the health, safety, and welfare of the community would be substantially endangered were they to strike. It is not difficult to visualize the adverse effect on the public interest of a strike by the employees of a privately operated hospital or of a public utility. On the other hand, it [w]ould be extremely difficult to conjure up such a threat to the public interest arising out of a strike of the employ-

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[17]On December 1, 1968, the employees of privately owned Consolidated Edison, which provides electricity to the City of New York, went on strike, and the stoppage lasted for one week. On December 15, 1968, drivers who worked for privately owned fuel oil delivery companies in New York City also went on strike, causing the Emergency Control Board of the city to declare that the city was in a state of imminent peril. Both of these strikes occurred during an extremely cold period and at a time when a Hong Kong flu epidemic was peaking in the city. The New York City Health Commissioner noted that people might die because of lack of heat. *New York Times,* December 25, 1968, p. 1. Both of these strikes were legal and can be compared with many public employee strikes which have been found not to have caused any serious threat to the health and safety of public.

> ees of a recreation department of a municipality or of the clerical staff of a state agency. In short, it appears to me that to deny all public employees the right to strike because they are employed in the public sector would be arbitrary and unreasonable." 299 A.2d at 448-449.

While the District may claim that strikes by sanitation employees are particularly likely to endanger the public's health and safety, studies have shown this not to be the case. See Kheel, "Strikes in Public Employment", 67 Mich.L.Rev. 931, 941 (1969), and Burton and Krider, "The Role and Consequences of Strikes by Public Employees", 79 Yale L.J. 418, 427-428 (1970). Moreover, the Union is not suggesting that the common law could not allow the Superior Court to enjoin a strike regardless of circumstances. Rather, the Union urges that the common law, under the MMBA, allow public employees to strike unless the public employer is able to demonstrate that the service it provides is essential *and* that imminent harm and danger to the health and safety of the public will result unless the strike is enjoined. This determination would be made by the trial court on a case-by-case basis, taking into account all of the factors attending the particular dispute. Further, enjoining such a strike is not the same as allowing damages to the employer.

Finally, it has been asserted that since it is contrary to public policy to establish terms and conditions of employment for public employees through the bilateral process of collective bargaining, public employee strikes in support of collective bargaining demands likewise violate public policy. This proposition, which found support in

early Courts of Appeal[18] decisions, has since been rejected by the Legislature through the MMBA. See *El Rancho Unified School Dist. v. National Education Ass'n., supra,* at 962-964 (Grodin, J., concurring).

The Legislature has enacted "a comprehensive scheme creating rights of organization in employees of local public agencies and providing for the resolution of labor disputes between such local public entities and recognized employee organizations." *Union of American Physicians and Dentists v. County of Los Angeles* (1983), 144 Cal.App.3d 236, 240. A review of the cases under the MMBA establishes in California for local government employees all the basic ingredients of a collective bargaining system, except the establishment of a state-wide administrative agency.[19] Thus, under the MMBA, bargaining units may be established and a union selected as the exclusive bargaining representative, *Reinbold v. City of Santa Monica* (1976), 63 Cal.App.3d 433; *Placentia Fire Fighters, Local 2147 v. City of Placentia* (1974), 57 Cal.App.3d 9; public employees have the right to organize, select and be represented by a union in their employment relations with the public employer, *Social Workers Union, Local 535 v. Alameda County Welfare Department* (1978),

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[18] *City of San Diego v. American Federation of State etc. Employees, supra; Almond v. County of Sacramento, supra; Newmarker v. Regents of Univ. of Cal.* (1958), 160 Cal.App.2d 640, 646; *City of Los Angeles v. Los Angeles etc. Council, supra;* 46; *Nutter v. City of Santa Monica, supra.*

[19] Even in this area, MMBA provides, under Section 3507, that a public agency may establish a local administrative agency to administer employer-employee relations. See, *e.g., Union of American Physicians and Dentists v. County of Los Angeles, supra; American Federation of State, etc. Employees, Local 119 v. Los Angeles County* (1975), 49 Cal.App.3d 356; *Social Workers Union, Local 535 v. Los Angeles County* (1969), 270 Cal.App.2d 65.

11 Cal.3d 382; public employee unions have the right to bargain collectively with the public employer and establish a bilateral relationship on wages, hours, and terms and conditions of employment, *Vernon Fire Fighters v. City of Vernon* (1980), 107 Cal.App.3d 802; *Los Angeles, etc. v. Superior Court* (1979), 23 Cal.3d 55; *Fire Fighters Union, Local 1186 v. City of Vallejo* (1974), 12 Cal.3d 608; the parties have the right to agree and sign a binding and enforceable collective bargaining agreement, *Glendale Employees Association v. City of Glendale* (1975), 15 Cal.3d 328; and the parties can agree to and enforce binding arbitration provisions contained in a collective bargaining agreement, *Taylor v. Crane* (1979), 24 Cal.3d 442.

Thus, as Justice Grodin observed in *El Rancho Unified School District v. National Education Association, supra,* at 963, the original policy foundation for the common law rule that public employee strikes are illegal "has been substantially undermined, if not obliterated". The Legislature has granted public employees the right to organize and bargain collectively, and therefore, a court-imposed *per se* rule that strikes are illegal with tort liability and with no statutory prohibition is improper. Such a proposition was made clear by Judge J. Skelly Wright in *United Federation of Postal Clerks v. Blount* (D.D.C. 1971), 325 F.Supp. 879, 885 (3-judge Court, concurrence), *aff. Mem.* (1971), 404 U.S. 802, in which he noted:

> "The right to strike seems intimately related to the right to form labor organizations, a right which the majority recognizes as fundamental and which, more importantly, is generally thought to be constitutionally protected under the First Amendment — even for public employees. [Citations omitted.] If the inherent purpose of a labor organization is to bring

> workers' interests to bear on management, the right to strike is, historically and practically, an important means of effectuating that purpose. A union that never strikes, or which can make no credible threat to strike, may wither away in ineffectiveness."[20]

Petitioners submit that the so-called "policy arguments" used by the Courts of Appeal to formulate the common law are no longer logically or legally supportable and, as the Supreme Court stated: "Whenever [a common law] rule is found unsuited or unsound, it should be set aside and a rule declared which is in harmony with those conditions and meets the demands of justice." *Rodriguez v. Bethlehem Steel, supra,* at 394. A common law permitting public employees to strike would be in harmony with present conditions, meet the demands of justice, result in more meaningful negotiations between public employers and unions, and reduce the number of public employee strikes.

### 3. Permitting Public Employees a Right to Strike Would Result in More Meaningful Negotiations Between Public Employers and Public Employee Unions.

Strikes by public employees are a reality which cannot be ignored. Although the reasons why public employees strike are varied, there can be no question that many public employee strikes are caused in large part by the fact that without the right to strike or a credible threat to

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[20]See also *Timberlane Regional School District v. Timberlane Regional Education Association, supra,* 317 A.2d at 557 ("Fundamental to collective bargaining, the right to strike is as fundamental to public sector unions as it is to unions in the private sector. . . ."); *Bayonne Textile Corp. v. American Federation of Silk Workers* (N.J. 1934), 172 A. 151, 154 ("The right to organize and bargain collectively connotes the right to strike . . .").

strike, public employees have no negotiating strength. It is basic that a public employer, confident that its employees cannot strike, fails to respond in good faith to union proposals. This, in turn, produces frustrations which exacerbate labor-management conflicts and provoke strikes. See *Stationary Engineers v. San Juan Suburban Water Dist.* (1979), 90 Cal.App.3d 796, where the Court held that a public employee strike was illegal even though the trial court found the employer guilty of bad faith bargaining. See also Comment, "California Assembly Advisory Council's Recommendations on Impasse Resolution Procedures and Public Employee Strikes", 11 San Diego L.Rev. 473, 478 (1974).

In *Timberlane Regional Schl. Dist. v. Timberlane Regional Educ. Ass'n., supra,* 317 A.2d at 557, the New Hampshire Supreme Court stated:

> "A credible strike threat equalizes the parties' bargaining positions so that collective bargaining, as the bilateral determination of an agreement, can operate effectively. Without the right to strike to back up their demands, teachers and other public employees will continue to be at a disadvantage in negotiations. In fact, in the public sector, the denial of the right to strike has the effect of heavily weighing the collective bargaining process in favor of government."

The Supreme Court of Idaho similarly observed, in *School District No. 351, Oneida County v. Oneida Education Association* (1977), 98 Idaho 486, 490, 567 P.2d 830, 834:

> "[I]n the public sector the denial of the right to strike has the effect of weighing the scales heavily in favor of the government during the collective bargaining process."

Numerous commentators who have studied this issue have concluded that a *per se* prohibition against public employee strikes is unwise and counterproductive, and have argued that permitting public employees to strike would result in more meaningful negotiations between the parties and provide a greater strike deterrent than laws that prohibit strikes. See Rosenberg, "Teacher Strikes: A Proposed Solution", 16 Urb. L. Annual 331, 354 (1979), ("Without the right to strike, the likelihood of impasses in negotiations increases. * * * When the union is secure and legally protected in its right to strike, the employer—aware of his own power to influence the strike decision—can be expected to exercise great sensitivity toward the bargaining process."); Kanes, "The Limited Right to Strike: Experience in Pennsylvania", 31 N.Y. Univ. Conf. on Labor 307, 309 (1978), ("[T]he limited right to strike . . . helps make collective bargaining work by bringing a sense of reality to the process. The right to strike is a two-edged sword and it can serve as a deterrent to unrealistic demands."); Bilik, "Toward Public Sector Equality, Extending the Strike Privilege", 21 Lab.L.J. 338, 347 (1978), ("[N]o strike laws . . . tend to make the employer dull to the danger signals, thus enhancing the likelihood of a bargaining breakdown."). See also, Edwards, "The Developing Labor Relations Law in the Public Sector", 10 Duq.L.Rev. 357 (1972); Burton & Krider, "The Role and Consequences of Strikes by Public Employees", 79 Yale L.J. 418 (1970); and Kheel, "Strikes in Public Employment", 67 Mich.L.Rev. 931, 940-942 (1969).

### 4. The Appropriate Standard Should Be That Public Employees May Strike so Long as Their Activity Does Not Present a Clear and Present Danger to the Health and Safety of the Public.

Petitioners urge that the common law be formulated to allow public employees to strike, in the absence of a specific legislative prohibition,[21] or unless the public employer is able to demonstrate that the service it provides is essential to the community and that imminent harm to the public will result unless the strike is enjoined.[22] Additionally, the public employer must come before the court with clean hands, in the sense of having attempted to resolve the dispute in good faith and not having committed any acts in violation of the MMBA.

Under such a common law, a public employee strike could be enjoined only when the public employer is able to convince the trial court that a clear and present danger to the health and safety of the public exists. A requirement that the public employer demonstrate irreparable harm is supported by several cases. See *Holland Schl. Dist. v. Holland Educ. Ass'n., supra,* 157 N.W.2d at 210; *Timberlane Regional Schl. Dist. v. Timberlane Regional*

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[21]Labor Code Section 1962 specifically prohibits fire fighters from striking. This is the only classification of public employees that the Legislature has specifically prohibited from striking. Also see *Cooper, supra,* at 912, fn. 5. Section 3509 of the MMBA, cannot be interpreted as a legislative prohibition of a public employee srike. See *El Rancho, supra* at p. 958 fn's. 17 and 18 and *San Diego Teachers, supra,* at p. 13 holding that Section 3549 of EERA excluding Labor Code Section 923 does not prohibit strikes. The language of MMBA Section 3509 and EERA Section 3549 are substantially identical.

[22]Petitioners are not suggesting that the Supreme Court modify in any way the traditional power of the trial courts to issue injunctions and temporary restraining orders regarding the conduct of picket lines. See C.C.P. Section 527.3

*Educ. Ass'n., supra,* 317 A.2d at 559. If the strike is not effective or alternative services are available, then the requisite "irreparable harm" is not present. See *City of Buffalo v. Magan* (1975), 370 N.Y.S.2d 771, where an injunction was refused as to striking fire fighters because the union's strike was not effective in that it did not interrupt services.

In the instant case, under this standard, there was no irreparable harm. As the District has stated on several occasions (see, *e.g.,* Resp. Br. to Court of Appeal, p. 5; R.Tr. 1252:18 and 1258:5), the strike was not effective since management, supervisors and other non-striking employees were able to operate the District's facilities.

The rule proposed allows the trial court to consider whether the public employer has bargained in good faith and therefore comes into court with "clean hands". In the instant case, the Court of Appeal adopted the reasoning of *Stationary Engineers v. San Juan Suburban Water District, supra,* which held that a public employee strike is illegal regardless of whether the employer bargains in bad faith. Numerous courts in other states have applied traditional equity principles to require the public employer to come to court with clean hands. See *Holland Schl. Dist. v. Holland Educ. Ass'n., supra,* 157 N.W.2d at 211 (refusal of government to bargain in good faith would be a factor of importance in the determination of whether or not to issue an injunction). See also *Mastro Plastics Corp. v. Labor Board* (1956), 350 U.S. 270 (employees who engage in strike because of employer's unfair labor practice entitled to return to work even where they have been permanently replaced).

**B. A Common Law Liability for Damages Based on a Tort Arising Out of a Public Employee Strike Is Not Proper in the Absence of a Specific Legislative Enactment.**

Although there has been a series of cases by the Courts of Appeal that have held that a public employee strike is contrary to public policy and under the California common law and subject to injunctive relief, the only case in California on the issue of damages is *Pasadena Unified School District v. Pasadena Federation of Teachers, supra*. Pasadena Unified School District held that there was tort liability essentially and first of all on the basis that the union, by striking, was inducing a breach of contract between the individual teacher and the school district. However, the Court of Appeal held, under a separate theory, that there was liability for damages of a "theory of direct liability for harm resulting from unlawful acts." 72 Cal.App.3d at 111. However, *Pasadena Unified School District* did not decide the issue of damages in relationship to the MMBA, a comprehensive state-wide collective bargaining statute.[23] *Pasadena* held there was liability as

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[23]The *Pasadena* case involved a school district that was covered by the Winton Act. Prior to the Educational Employment Relations Act (Government Code Sections 3540, *et seq.*), labor relations between the school districts and teachers were covered by the Winton Act, Education Code 1959, Section 13080. The Winton Act was repeatedly interpreted, unlike the MMBA, as *not* providing a collective bargaining system for teachers. For example, the courts held that teachers were not to be represented by an exclusive bargaining agent but by a negotiating council or certificated employees council; the school district could not sign a collective bargaining agreement with a union; bargaining units could not be established; and decisions on wages and conditions of employment were to be made unilaterally by the school district after meeting and conferring with a council representing all the teachers and their organizations. *California Fed. of Teachers, AFL-CIO v. Oxnard Elementary Schools* (1969), 272

a tort solely on the basis that the law was presumed to be that the union did not have the right to strike. The basis under 4 Restatement of Torts, Section 876, page 435, was that there was a breach of duty if public employees strike against their employer, thereby constituting an unlawful act. Therefore, if a strike is not *per se* unlawful, then the rationale of *Pasadena* collapses, and there is no basis for a *per se* tort liability in damages.

Tort liability for damages in labor relations in the public sector is totally inconsistent with the results of *City and County of San Francisco v. Cooper, supra,* where the Supreme Court held that the Memorandum of Understanding that was negotiated between the union and the City and County was enforceable, even though the agreement resulted from a public employee strike under the MMBA. The measure of damages to the public employer was clearly the amount of money that the employer was forced to pay due to the economic action asserted by the public employees and the union. In the absence of an indemnification, release or waiver, the public employer, under *Pasadena,* would have a cause of action for damages for the amount of salaries paid as a result of the settlement and the agreement resulting from the strike. A tort liability for damages is squarely in conflict with the

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Cal.App.2d 514; *Berkeley Teachers Assn. v. Berkeley Fed. of Teachers* (1967), 254 Cal.App.2d 660; *West Valley Federation of Teachers, Local 1953, AFL-CIO v. Campbell Union High School District* (1972), 24 Cal.App.3d 297; *San Juan Teachers Assn. v. San Juan Unified School District,* (1974), 44 Cal.App.3d 232; *Grasko v. L. A. City Board of Education* (1973), 31 Cal.App.3d 290 (disapproved in *Cooper, supra,* on legality of the settlement). In *Cooper,* the Supreme Court held that a bilateral agreement caused by a strike was lawful under the MMBA. However, a collective bargaining agreement was beyond the authority of the school district under the Winton Act. The unilateral resolution adopted by the school district, although caused by a strike, was lawful.

practical results of *Cooper.*[24] To allow enforcement of a strike settlement agreement and still allow damages as a tort results in the court imposing sanctions and is punitive in nature.

The Supreme Court, in *Cooper,* commented on sanctions that have the effect of prolonging a labor dispute rather than encouraging settlement of the issue between the parties, and stated:

> "The question as to what sanctions should appropiately be imposed on public employees who engage in illegal strike activity is a complex one which, in itself, raises significant issues of public policy. [Footnote omitted.] In the past, several states have attempted to deter public employee strikes by imposing mandatory, draconian statutory sanctions on striking employees; experience has all too frequently demonstrated, however, that such harsh, automatic sanctions do not prevent strikes but instead are counterproductive, exacerbating employer-employee friction and prolonging work stoppages. [Footnote omitted.] As a consequence, recent advisory reports prepared by labor relations experts in a number of jurisdictions have uniformly recommended the abandonment of such 'automatic' sanctions and have urged the adoption of a variety of discretionary sanctions which provide the public employer a measure of flexibility necessary to meet varying negotiating situations. (See Smith, *State and Local Advisory Reports on Public Employee Labor Relations Legisla-*

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[24] *Cooper* may be explained by the holding that the courts will not go behind the legislative act and review the motives of a legislative body. However, such a rationale would totally ignore the economic realities of a settlement agreement due to a public employee strike.

*tion: A Comparative Analysis* (1969), 67 Mich.L.Rev. 891, 910-914.)" 13 Cal.3d at 917.

The Supreme Court further cited with approval, in footnote 9 at page 917, the commentator who declared that "the imposition of sanctions may be counterproductive, . . ." Further, the Supreme Court stated that, "[t]o date, the California Legislature has declined to prescribe any specific sanctions for public employee strikes." (p. 918.)

A court-imposed common law liability for damages in the absence of legislation and in the face of the MMBA would support a ". . . mandatory, draconian sanction . . ." in a public employee strike that the Supreme Court in *Cooper* specifically noted was counterproductive. If such "counterproductive" sanctions for damages are to be imposed at all, it must be done by the Legislature and not by the courts.

The public employer has the means to economically counteract a strike. The public employer, under the MMBA, has the right to replace striking employees in the same manner as the employer can replace strikers in the private sector. *NLRB v. Mackay Radio and Telegraph Co.* (1938), 304 U.S. 333.

Under a collective bargaining process, the public employer has the right and authority to continue operations by hiring replacements or using supervisory and management employees, as the District did in this case. Further, if the strike creates a substantial and irreparable danger to health and safety of the public, the employer can seek an equitable order. In such a situation, the Superior Court can make a determination upon a showing by the public employer that there is a danger to the health and safety of the public, and issue appropriate relief.

Allowing damages, in addition to prolonging the labor dispute and the strike, places the courts on the side of the public employer, which seriously disturbs the balance of the collective bargaining scheme under the MMBA. A public employee strike against a public employer is an economic method of obtaining a fair and equitable agreement. Under the MMBA, the parties themselves must resolve the dispute without interference by a court. A potential damage liability against the union, its staff and the employees means that the court has placed the weight of its authority on one side of the bargaining table.

As a matter of policy under the MMBA, a claim for damages can only increase the hostility and prevent a quicker resolution of the problems that originally caused the strike. A powerful union with strong resources or a group of employees with a strong will to continue striking will continue to strike until the public employer agrees, as part of the settlement, to give a release or a waiver as to any damages. A weak union or employees who are anxious to return to work will return to work facing a damage suit by the public agency. In either situation, the balance between the employees, the union and the public employer is seriously disrupted. If the public policy of the state is to obtain resolutions of labor disputes, then a cause of action of damages can only prolong a strike, given the resources of the union and the will of the employees to continue the strike until the public employer agrees to forgo any claim for damages as part of an overall settlement. The strike is then over the issue of a release or waiver and may be more difficult to settle, and is therefore counterproductive. See *Gridley, supra,* at 202, fn. 11.

In *City of Fairmont v. RWDSU* (1980), 283 S.E.2d 589, the West Virginia Supreme Court was faced with this issue as a matter of first impression. The West Virginia

court carefully reviewed the issue as to whether there is a common law right to damages. The Court, after citing *Lamphere Schools v. Lamphere Federation of Teachers* (1977), 400 Mich. 104, 252 N.W.2d 1818, where the Michigan Supreme Court held there was no common law right to damages, concluded that the West Virginia common law did not allow damages for a public employee strike. The Court held that in order to hold that there was a common law action for damages, the Court would have to revert to an outmoded and disregarded theory of conspiracy that was developed in England under the common law that working persons did not have the right to engage in concerted and collective actions to further their needs regarding wages and working conditions within the framework of a labor union. The Court held that such a common law concept of conspiracy was never adopted in the United States under the common law, and stated:

> "Thus, while some constitutional protection is extended under the First Amendment to public employees to organize, speak freely and petition, it is clear that a public employer is not required to recognize or bargain with a public employee association or union in the absence of a statutory requirement. These decisions, however, do not resolve the question presented in this case. Oddly enough ther are few decisions that address the precise issue before us, whether a common law cause of action exists for damages arising from a peaceful work stoppage against the employer by public employees. In the leading case of *Lamphere Schools v. Lamphere Federation of Teachers,* 400 Mich. 104, 252 N.W.2d 818, 95 LRRM 2279 (1977), the Supreme Court of Michigan found no common law right and declined to create a

common law remedy for damages against a teacher's union for a peaceful work stopped:

> "The proposed remedies in tort, which the School District asserts, in the case at bar, are heretofore unknown to the Michigan common law. Although couching its cause in such familiar tort terms as 'causing a breach of a common law and statutory duty', 'intentional interference with individual contractual relationships', and 'civil conspiracy', the School District attempts to recover monetary damages from teacher federations for conduct not presently actionable, to wit: the withholding of services through peaceful concerted action of public employees. [Footnote omitted.]"

The West Virginia Supreme Court concluded that there was no common law in the State of West Virginia that provided a remedy for damages concerning a peaceful strike by public employees, and held:

> "We have not been cited any case where a court has held that a peaceful strike by public employees under the conditions existing in this case gives rise to a damage action. The assertion that the strike is 'illegal' only serves to confuse the issue. The term 'illegal' in the present case is much like the term 'unfair' which concerned this Court in the *Ohio Valley Advertising* case, *supra.* Its meaning must be derived from the context in which it is used. Here we consider the term 'illegal' against the narrow band of common law labor principles where damages are sought for a peaceful strike. We conclude that where public employees who have no employment contracts with their employer, engage in a work stoppage which is peaceful and directed only against the employer with no attempt to interfere with his customers or bar in-

gress to other employees there is no common law right to damages. In this context, the work stoppage is not 'illegal' in the sense that it gives rise to a common law action for damages. We, also, adopt the view of the Michigan Supreme Court in *Lamphere* and decline to judicially extend under our common law powers a remedy for damages. See *Morningstar v. Black & Decker Manufacturing Co.*, ____ W. Va. ____, 253 S.E.2d 666 (1979).

In so declining, we note that in most other states the legislature has made an effort to make some statutory accommodations to the labor relation problems that exist in the public sector. Indeed, it was the initial inability of the courts to judicially resolve the competing interests of private employees and private employers that led to federal legislation in the labor law field. Most if not all commentators in the labor law area agree that the complex issues in this field are ill suited to any comprehensive judicial situation." (Footnotes omitted.)

The Court, in *City of Fairmont,* distinguished *Pasadena Unified School District* on the basis that the decision was predicated on the existence of written employment contracts between the teachers and the school district and that the teachers had engaged in a work stoppage during the school year while they were under contract.

In *Lamphere Schools v. Federation of Teachers, supra,* the Michigan Supreme Court discussed this problem in the context of public policy and the common law of the State of Michigan, and stated:

"Plaintiff School District correctly relies on the *Detroit* case for the proposition that strikes by public employees are unlawful in common law. However, that case falls far short of creating the classic 'duty',

> 'breach of duty', and therefore 'monetary damages', the triad of traditional tort law. The *Detroit* case stands for the limited proposition that strikes by public employees are against public policy and *are therefore subject to injunction.* There is no precedent establishing a common law tort duty owed by the Federation or its teachers to the School Board regarding peaceful strike activities."

Proceeding on to the policy questions under the common law, the Michigan Supreme Court further stated:

> "Furthermore, the ultimate legislative goal is to achieve a prompt, fair resolution of disputes while avoiding the disruption of the educational process. To recognize alternative tort remedies would result in a substantial negative impact upon such purposes. It would encourage the teachers and School Board inaction. Eventual settlements could be prolonged pending the resolution of multiple tort claims and counterclaims. The inevitable result would be to create labor law log jams in our courts, and, at the same time, to exacerbate labor management disputes."

The Supreme Court, in *El Rancho Unified School District,* cited *Lamphere Schools v. Lamphere Federation of Teachers, supra,* and quoted with approval the Michigan Supreme Court's statement that allowing tort remedies for damages could have a substantial negative impact upon the collective bargaining objectives of the state law.

A damage award as a remedy or a sanction under the MMBA should only be imposed, if at all, by the Legislature. The fact that the Legislature has remained silent on this subject does not automatically require the courts to provide a remedy or sanctions that properly belong to the Legislature. The United States Supreme Court has held that where a matter involved interstate commerce, and

the National Labor Relations Board had not taken jurisdiction, the issue of preemption still applied and the state court could not fill the vacuum in the absence of specific congressional authorization. *San Diego Building Trades Council v. Garmon* (1957), 353 U.S. 26; *Guss v. Utah Labor Relations Board* (1957), 353 U.S. 1; *Meat Cutters v. Fairlawn Meats, Inc.* (1957), 353 U.S. 20. This issue is closely related to the preemption doctrine, and since the MMBA is silent on this issue, then this Court should not create a common law tort as a substitute to fill a legislative vacuum.[25]

In *IBEW v. City of Gridley, supra,* the Supreme Court, under the MMBA, refused to allow the City the remedy of revoking the union certification due to on a strike in the absence of legislative authority. The Supreme Court stated, "If the Legislature believes an additional remedy is warranted, and a revocation of the union's recognized status is likely to prove more beneficial than harmful (see footnote 10, p. 202), it can, of course, expressly authorize such revocation." In the same manner, if the Legislature believes that a tort remedy is appropriate and necessary

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[25]The State Legislature has repeatedly refused to enact proposed legislation that would prohibit public employee strikes in California. In the 1981-1982 session alone, the following bills were rejected: SB 1551 (Sen. Speraw), public schools; AB 1642 (Assemblyman LaFollette), public schools; AB 670 (Assemblypersons Filante, Wyman, Bergeson, Banker, Dennis Brown, Frazee, Moorhead and Nolan, and Senators Doolittle, Johnson and Speraw), all public agencies; AB 1662 (Sebastiani), public schools, State of California and local emergency agencies; AB 1847 (Lewis), local public agencies, public schools, State of California and transit districts. In the 1983-1984 session: AB 1376 (La Follette), Southern California Rapid Transit District; AB 187 (Young) and SB 778 (Dills), peace officers of local public agencies, also providing for third party binding arbitration of interests disputes.

within the scheme of the MMBA, then it is up to the Legislature to provide such a remedy.

### C. The Court of Appeal Was in Error in Holding That the Union Could Not Assert a Defense That the District Engaged in Unfair Labor Practices Under the MMBA.

The Court of Appeal, relying on *Stationary Engineers v. San Juan Suburban Water District, supra*, held that a public employee strike was illegal and allowed a common law tort for damages regardless of whether the public employer had violated the MMBA or not. (Appendix "A", p. 8.) *Stationary Engineers* did so hold. However, the concurring opinion stated that the law does allow such a defense.

This case presents a complete record after a lengthy trial on the negotiations between the District and the Union. The blue collar employees were faced in the 1974 negotiations with the District demand to reduce a substantial number of employees from a 48 hour week to a 40 hour week, thereby resulting in a substantial net loss of take-home pay. After a short strike the matter was resolved, and there was a reduction to 44 hours rather than to 40 hours, with time and one half for overtime. In 1975, there was a further reduction, which resulted in an agreement where the substantial number of employees were reclassified and placed on a special rate.[26] In the 1976 negotiations, the employees were faced with further loss of take-home pay. Further, the employees in the landfill (approximately 40% of the unit) did not receive any rest periods or any time for changes and shower time during

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[26]Such rate is referred to as the "Y" rate, where the employee's salary is fixed at a higher rate than the classification salary in the agreement.

the work day, whereas the other employees did receive such time, as well as a 15 minute rest break in the morning and in the afternoon. The District proposed to remove the provisions of the existing Agreement for binding arbitration on terminations and suspensions. On June 23, 1976, the District made a final offer of a general 4.5% increase and a 2.5% increase for Y rated employees, with no change in shower, change and rest time for the landfill employees. On July 1, the District made a new offer, consisting of a 5.1% increase and a 2.5% increase to the Y rated employees, with a total of 40 hours in the year of overtime to the employees who had their overtime eliminated. However, the District negotiator made this offer only on the condition that the employee negotiating committee recommend the settlement to the membership, and that if the offer was not recommended, then the only offer on the table was the June 23 offer of a 4.5% increase, unless the treatment plant operators gave up their change and shower time, and in such event the offer would be increased to 5.1%. The employee negotiating committee, consisting of rank and file employees, refused to make such a recommendation, and therefore presented the June 23 proposal to the membership, which rejected it by a secret ballot vote of 280 to 70, and the employees voted to strike. (R.Tr. Vol. 3, pp. 565-595.)

The District's proposal of June 23 was the only proposal that could be presented to the membership by virtue of the District's position that the committee had to make a recommendation in favor of the second proposal of July 1. The result was that a number of the Y rated employees whose overtime hours would be reduced would end up with virtually no salary increase for the year, and to aggravate the matter, many of such employees had received no salary increase or a minimal increase in 1975. (Exh. 354; see also Memoranda of Understanding, Exhs.

355, 356 and 357.) In 1975, a number of such employees actually took a substantial decrease in take-home pay, and by the District's proposal prior to the strike, many of such employees received as little as a $10.00 a month increase, and those who were Y rated and also on a 48 hour week would have received a loss in pay based on a 2.5% offer.[27]

In *Stationary Engineers*, the Superior Court made a finding that the public employer had in effect violated the MMBA by not negotiating in good faith with the union, but nevertheless held that the public employee strike was illegal and the District had a right to discharge the employees. The Court of Appeal held any employer violations of the MMBA did not affect the legality of the strike, and further that the findings of the Superior Court were not supported by the evidence. Justice Reynoso, concurring, would apply the rule under the federal law that a strike that may be illegal under certain circumstances is legal and justified where the public employer has committed unfair labor practices. However, Justice Reynoso concluded, upon reading the record, that the seriousness of the employer's misconduct did not out-

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[27]For example, a Sewer-Maintenance (probably one of the most difficult jobs due to the inherent nature of the work) received $1,123.00 per month in 1973, $1,163.00 per month in 1974, and a drop to $1,113.00 per month in 1975. In 1976, based on a 5.1% increase, he would receive $1,128.00 per month (amounting to a $15.00 per month increase after losing $50.00 per month in 1975). For the period 1973-1976, he gained 1% in salary increases. The Court can take judicial notice that this was a period of substantial inflationary fluctuations in our economy. The question is, under the common law under such adverse conditions, does the Sewer Maintenance Worker, as a public employee, have to accept the District's final offer, which he considers to be unfair and unjust, or terminate his employment, or can he engage in a peaceful strike to gain further salary without subjecting himself, his assets, and his union to substantial damages?

weigh the employees' action in engaging in a work stoppage.

*Stationary Engineers* did not engage in an analysis of the MMBA as a comprehensive state-mandated collective bargaining process for local governments. Under the federal law an unlawful strike by a union under a no-strike clause of an agreement can be justified and lawful due to an employer's unfair labor practices. *Mastro Plastics Corp. v. Labor Board, supra.* The California courts have consistently looked to the federal law for guidance in interpreting and applying the MMBA. *Firefighters Union Local 1186 v. City of Vallejo* (1974), 12 Cal.3d 608.

Under the EERA, the courts have upheld a PERB decision that conditioned the union's strike action on the public employer's good faith negotiations as required by the law. *Modesto City Schools v. Modesto Teachers Assn.* (1982), 136 Cal.App.3d 881.

**D. An Absolute Prohibition of the Right to Strike Under All Circumstances Based on a *Per Se* Common Law Rule Is Contrary to the California Constitution on Free Speech, Association, and Equal Protection of the Law.**

Although California Constitutional rights have been rejected by the Court of Appeal, including *Pasadena Unified School District, supra,* and the instant case (Appendix "A", p. 7), the Supreme Court has never reviewed the issue as to the protection of constitutional rights to a public employee strike.

A distinction must be made between the right of the courts to exercise their equity jurisdiction when a strike is causing a danger to the health and safety of the public, and a *per se* unlawful rule that prohibits all public employee strikes and allows damages. It is not in question,

nor are Petitioners urging, that there is a constitutional infringement when a court exercises equitable authority to prevent a clear and present danger upon a proper showing that there is a danger to the health and safety of the community. However, in the absence of such a showing, a *per se* prohibition on public employees associating with other employees and collectively withdrawing their services and peacefully picketing to publicize and notify the public and other employees is an infringement on the right of public employees and the union to exercise their constitutional rights. California Constitution, Article I, Sections 1, 2, 3 and 7.

Employees in the private sector, exclusively under California law, have long been held to have the right to engage in a peaceful withholding of services, collective action, and the right to picket.[28] ***McKay v. Retail Auto S. L. Union No. 1067*** (1940), 16 Cal.3d 311, held that to withhold services on a collective basis and assert economic pressure upon the employer was a right guaranteed

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[28]There is no showing that the strike was other than peaceful. The Complaint and the Declarations requesting a Temporary Restraining Order and the Preliminary Injunction showed that there were pickets and that the Union was engaged in a strike, but nowhere was it alleged that there was any violence or blocking of ingress or egress, or that in any manner the strike was other than peaceful. (C. Tr.: pp. 1, 13, 21, 32, 44, 55; see also Order to Show Cause Re Contempt, C. Tr.: pp. 1, 87.) The testimony of District witnesses clearly established that the employees, including management employees, came and went from the various facilities without any interference from the strikers, and that at a number of locations there was no picketing. The court of Appeal implied that the strike was other than totally peaceful. (Appendix "A", p. 7, n. 2.) However, a few isolated incidents were never proven to have been the responsibility of the Union. The District's pleadings and claim for damages have, without exception, proceeded on the theory that the peaceful strike itself was unlawful and allowed damages.

under the Constitution as a matter of free speech and assemblage. See also, *Steiner v. Long Beach Local No. 128* (1942), 19 Cal.2d 672.

The right to withhold services and engage in peaceful picketing as a collective matter constitutes a fundamental right, and cannot be waived by the employees by virtue of public employment. *Vogel v. County of Los Angeles* (1967), 68 Cal.2d 18, 22. See also *Keyishian v. Board of Regents* (1966), 385 U.S. 589, and *Garrity v. New Jersey* (1966), 385 U.S. 493.

In *Bagley v. Washington Township Hospital District* (1966), 65 Cal.2d 499, 507, the Supreme Court held that a government employer could not restrict the political activities of the employees without conflicting with the employees' constitutional rights, and stated:

> "The public employee surely enjoys the status of a person protected by constitutional right. Public employment does not deprive him of constitutional protection. In the absence of an imperative necessity to protect the public from irresponsible activity of so serious a nature that it would disrupt the public welfare, such protections are not subject to distraction."

The Supreme Court, in *Committee to Defend Reproductive Rights v. Myers* (1981), 29 Cal.3d 252, applied *Bagley* to invalidate statutory provisions that limited Medi-Cal funding for abortions as violative of California's standards of equal protection. The *Bagley* and *Myers* cases are applicable to the constitutional right of a public employee to withhold services. A *per se* rule prohibiting such speech and assembly is unconstitutional where the public employer does not have to show that the strike is a clear and present danger to the public. See *Schwartz-Torrance Ins.*

*Corp. v. Bakery & Confectionery Workers,* 51 Cal.2d 766 (1964).

Public employment under the MMBA covers a wide spectrum of occupations and services, ranging from obviously essential services that affect the public's health and safety, such as police and fire, to the other extreme, involving employees working at golf courses, libraries, welfare offices, etc. It cannot be seriously contended that all of these services, without exception, affect the health and safety of the public so as to justify a *per se* rule that restricts the constitutional rights of public employees. The *per se* prohibition rule that has been applied by the Court of Appeal is overly broad, and restricts the right of public employees to engage in peaceful association and speech. In *L. A. Teachers Union v. L. A. City Board of Education* (1969), 71 Cal.2d 551, the Supreme Court held:

> "When the effect of exercise of First Amendment rights related to speech is impaired by governmental regulation, the Court must weigh the extent of the impairment against both the importance of the governmental interest and the substantiality of the threat which the forbidden speech or related activity poses to their interest. The more substantial the infringement of the First Amendment right is, the more compelling the governmental interest and the more ominous the threat to their interest must be. The danger of justifying restrictions of prohibition must be one which rises far above public inconvenience, annoyance or unrest."

In *McKay,* the Supreme Court, regarding private sector strikes, stated:

> "It must be taken as settled in this state, that workmen may associate together and exert various forms of economic pressure upon employers, pro-

> vided they act peaceably and honestly. The conventional means of exerting this economic pressure which have been held lawful are the strike . . . the boycott, both primary and secondary . . . and the picket."

In *Steiner v. Long Beach Local No. 128, supra,* the Supreme Court stated:

> "Workmen may lawfully combine to exert various forms of economic pressure upon an employer . . . this right is guaranteed by the federal constitution as an incident of freedom of speech, press and assemblage."

Under the principle of equal protection of the law, there is not a sufficiently strong state interest to justify the consitutional infringements of prohibiting a strike and allowing damages, where in the private sector, employees of a public utility, where a strike would have a serious and damaging effect on the public safety, have the right to engage in a strike and picketing.

The Supreme Court has long held that constitutional protections are provided to public employees in various forms of their political and economic activities. See *Skelly v. State Personnel Board* (1975), 15 Cal.3d 194; *Fort v. Civil Service Commission* (1964), 61 Cal.2d 331; *Kinnear v. City etc. of San Francisco* (1965), 61 Cal.2d 341; *Bagley v. Washington Township Hospital District, supra.*

The Supreme Court has had a long history of defining and providing free speech guarantees in labor disputes, and has never indicated that there is a distinction on a fundamental constitutional right as to whether an employee is employed by a private or a public employer, particularly where services may be substantially compara-

ble. See *In re Blaney, supra; In re Porterfield* (1946), 28 Cal.2d 91.

The constitutional issues as related to a public employee strike were observed by Judge Skelly-Wright in his concurring opinion in *United Federation of Postal Clerks v. Blount, supra,* where he states: "A union that never strikes or which can make no credible threat to strike may wither away in ineffectiveness."[29]

The California Supreme Court has frequently and without hesitation extended consitutional rights to California citizens under the California Constitution, although such rights are held not protected by the Federal Constitution. In *Robbins v. Pruneyard Shopping Center* (1979), 23 Cal.3d 899, the Supreme Court stated:

> "The duty of this court is to help determine what liberty of speech means in California. Federal principles are relevant, but not conclusive so long as federal rights are protected."

In *People v. Brisendine* (1975), 13 Cal.3d 528, the Supreme Court stated that "The California Constitution is, and always has been, a doctrine of independent force." See also *People v. Teresinski* (1982), 30 Cal.3d 822; *People v. Chavez* (1980), 26 Cal.3d 334; *Committee to Defend Reproductive Rights v. Myers, supra; City of Santa Barbara v. Adamson* (1980), 27 Cal.3d 123; *People v. Pettengill* (1978), 21 Cal.3d 231; *Parrish v. Civil Service Commission*

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[29]See also Chief Justice Roberts' dissent in *Schl. Comm. of Westerly v. Westerly Teachers Association, supra,* 299 A.2d at 449, where he states: "The collective bargaining process, if it does not include a constitutional protected right to strike, would be little more than an exercise in sterile ritualism." Further, see Theodore W. Kheel, "Resolving Deadlocks without Banning Strikes," Monthly Labor Review (July 1969), pp. 62-63.

(1967), 66 Cal.2d 260; and *Wirta v. Alameda Contra Costa Transit District* (1967), 68 Cal.2d 51.

California has a long tradition of protecting the personal liberties and constitutional rights of its citizens. As the concurring opinion in *Committee to Defend Reproductive Rights, supra,* at pp. 293-294, stated: "The California Constitution has traditionally embodied innovations and concerns for individual liberties . . . ."

A *per se* common law rule prohibiting speech and withdrawal of services in all peaceful public strikes deprives public employees of the basic personal liberties of association and equal protection of the law, and removes their basic right to improve their wages, living standards and conditions of employment by peaceful economic conduct.[30]

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[30]It should be noted that among public officials and the public in the United States and throughout the democratic world, there is admiration, applause, and even a Nobel Peace Prize for the Solidarity movement in Poland because government employees went on strike against government-owned shipyards and other industries. At the same time, however, the Court of Appeal held that in California, a public employee strike was unlawful, and allowed substantial damages that could finanically cripple the public employee unions and public employees. Another historical irony is that Martin Luther King's birthday was recently made a national holiday, and he was assassinated in Memphis, Tennessee, where he was to parade and demonstrate in support of a city sanitation workers strike.

**E. The Court of Appeal Was in Error in Upholding the Trial Court's Allowance of Damages Based on 24 Hour Assignments to Management, Executive and Professional Employees Where No Work Was Required or Performed by Such Employees for the Entire 24 Hour Period.**

A considerable amount of testimony was presented during the trial establishing that the District, upon the commencement of the strike, immediately assigned supervising employees, including management, executive and professional employees, to various locations, particularly at the Upstream and Desert Treatment plants and maintenance yards, on a 24 hour basis. Such highly paid employees were paid on a 24 hour basis, even though the District conceded that for a substantial portion of the time, such employees were sleeping, eating, and driving to and from restaurants, etc. A number of witnesses testified on behalf of the Union that such employees, in addition to sleeping and eating, simply read books, entertained their girlfriends and family, and attended parties and barbecues, all of which were considered as work time by the District. See Appellants' Opening Brief, pp. 14-25. As an example, Mark Christensen testified that he worked 12 hours a day as a member of the bargaining unit during the strike at the Palmdale yard, and during the major part of the time all he did was sit around, talk, and watch television along with the other employees. (R.Tr. Vol. 3, pp. 684-714.)

Gilbert Lechuga, another member of the bargaining unit who worked during the strike, testified that one of the management employees, Payne, was present 24 hours a day and slept at the site, and that all that Payne did was read books, walk around the plant, engage in conversa-

tion, and attend the barbecue accompanied by his girlfriend and her daughter. (R.Tr. Vol. 3, pp. 716-736.)

The record is filled with other such testimony, which was uncontradicted by the District.

The Union submitted exhibits showing that reasonable assignments would have been on the basis of 12 hours a day or even 14 hours a day, and that a 24 hour assignment was unreasonable, and that there was no reasonable effort to mitigate the damages.

The Court of Appeal refused to follow the basic rule of damages as set forth in Witkin, *Torts,* Volume IV, Section 870, at p. 3158, that there is a duty to use reasonable care and minimize any losses. *Valencia v. Shell Oil Co.* (1944), 23 Cal.2d 840, holds that a plaintiff is bound to exercise reasonable care and diligence to avoid loss or minimize the resulting damages, and cannot recover for losses which might have been prevented by reasonable efforts. See also *Steelduct v. Henger-Seltzer Co.* (1945), 26 Cal.2d 634; *Kleinclaus v. Marin Realty* (1949), 94 Cal.App.2d 733; *Sheffet v. Los Angeles County* (1970), 3 Cal.App.3d 720.

The Court of Appeal affirmed the Superior Court's disregard of the basic rules of law on damages. The Court of Appeal did not require the Superior Court to follow the law regarding reasonable exercise of the duty to minimize damages. The Court of Appeal had the duty to review the measure of damages and remand, if necessary. See *A. A. Baxter Corp. v. Colt Industries, Inc.* (1940), 10 Cal.App.3d 144; see also Cal.Jur.2d Damages, Section 148, p. 290; *Benson Electric Co. v. Hale Brothers Associated* (1966), 246 Cal.App.2d 686; and *Kitchel v. Acree* (1963), 216 Cal. App.2d 119.

**F. The Court of Appeal Improperly Affirmed the Superior Court's Granting of Pre-Judgment Interest.**

The Court of Appeal held that the Superior Court did not make any finding that it was exercising its discretion under Civil Code Section 3288, and therefore the pre-judgment interest award was made under Civil Code Section 3287(a), which "establishes the right of the plaintiff to recover prejudgment interest whenever the amount of damages is liquidated, i.e., certain, or capable of being made certain by calculation . . . " (Appendix "A", p. 25.)

The Union set forth fourteen items to establish that there was a substantial dispute as to the amount of damages, and that damages could not be assessed until there had been a full trial and a judicial determination by the Superior Court, and therefore pre-judgment interest was not appropriate. Appellants' Opening Brief, pp. 28-29.

Further, the District did not specify the amount of compensatory damages until it filed its Amended Complaint on June 12, 1979, almost three years after the original Complaint was filed. (C.Tr.: 147.)

The Court of Appeal, in allowing pre-judgment interest, acted contrary to *Levy-Zentner Co. v. So. Pacific Transportation Co.* (1977), 74 Cal.App.3d 762. An award of pre-judgment interest, whether under Section 3288 or Section 3287(a), requires that the amount must have been capable of calculation and not dependent on a judicial determination. The Court of Appeal's decision is also contrary to *Esgro Central, Inc. v. General Insurance Company of America* (1971), 20 Cal.App.3d 1054, *E. L. White, Inc. v. City of Huntington Beach* (1982), 138 Cal.App.3d 366, and *Southern Pacific Transportation Company v. State of California* (1981), 115 Cal.App.3d 116, and *Greater Westches-*

*ter Homeowners' Association v. City of Los Angeles* (1979), 26 Cal.3d 86.

In *Greater Westchester,* the Supreme Court held that pre-judgment interest for mental and emotional injury in a nuisance action was improper, as the damages were not capable of being made certain by calculation.

In this case, the District, even by its Amended Complaint, claimed $400,000.00 or more in damages, as well as rejecting any offset regarding salaries saved by the District in not paying the striking employees. In addition, during the trial the District attempted to introduce additional damages by way of lost productive time, which was excluded by the Superior Court. Although originally disputed by the District, an offset was allowed as to salaries that were not paid to the striking employees. The Superior Court disallowed a 10% bonus that was paid to certain employees at the landfills. Further, the Court of Appeal reversed the Superior Court and provided that the District did not have the authority to pay time and a half to the management, executive and professional employees and was required to follow the Salary Ordinance, which provided for essential straight time for overtime for such employees. Such a discrepancy between the amount claimed by the District and eventually awarded by the Superior Court and then reduced by the Court of Appeal establishes that there was no clear amount of damages that was certain or could be made certain by calculation that could have been paid by the Union to the District as compensatory damages without the necessity of a full judicial determination.

## IV.

## CONCLUSION.

For the reasons set forth above, Petitioners request that this Petition for Hearing be granted and that the Court of Appeal's decision be reversed on liability and damages.

DATED: November 16, 1983.

Respectfully submitted,

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and
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# APPENDIX D

APPENDIX D

2ND CIVIL NO.

# 66088

# In the Supreme Court of the State of California

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY,
a public agency,
*Plaintiff-Respondent,*

VS.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION,
AFL-CIO, *et al.,*
*Defendants-Petitioners.*

**Appeal from Los Angeles County Superior Court**
**Hon. Charles H. Older, Judge**

## ANSWER TO PETITION FOR HEARING

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2ND CIVIL NO.
66088

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY a public agency,

*Plaintiff-Respondent,*

vs.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, ET AL.,

*Defendants-Petitioners.*

## ANSWER TO PETITION FOR HEARING

*To The Honorable Chief Justice And The Honorable Associate Justices Of The Supreme Court of California:*

County Sanitation District No. 2 of Los Angeles County, a public agency, Respondent in the above-entitled appeal, answers and opposes the Petition for Hearing in the Supreme Court as follows:

### I.
### STATEMENT OF THE CASE

On July 6, 1976, Respondent filed a complaint for injunctive relief and damages, based upon the involvement of Petitioners, Service Employees International Union, Local No. 660 ("Local 660"), Victor N. Hochee, Harry Gluck and Jack Roberts (jointly referred to hereinafter as "Appellants"), in a labor strike against Re-

spondent. (C.Tr. 1, 147)[1] This strike began on July 5, 1976, and lasted until on or about July 16, 1976. On the same date the complaint was filed, Respondent sought and obtained a temporary restraining order. Although the temporary restraining order prohibited Appellants from engaging in the strike, it was ignored. As a result of this failure to obey the order, Local 660 was adjudged guilty of contempt in October 1976, and fined $1,500.00. The propriety of the contempt citation was not appealed.

Thereafter, Respondent proceeded with the prosecution of this action. On August 13, 1981, following a twelve-day bench trial before the Honorable Charles H. Older, judgment was entered in favor of Respondent in the amount of $246,904.00, with interest thereon from July 18, 1976, and costs in the amount of $874.65. (C.Tr. 488)

Appellants appealed from this judgment. The opinion of the Court of Appeal, Second Appellate District (hereinafter cited as "slip op. ____"), issued on October 12, 1983. The Court of Appeal affirmed the trial court's finding of liability, declaring itself "bound by the presently well-settled rules that deny public employees the right to strike and which subject those who do engage in such unlawful labor practices to tort actions for damages." Slip op. 9. The Court of Appeal also affirmed the trial court's award of damages in all respects, with the exception of certain overtime expenses. The Court of Appeal ruled that Respondent could recover for only the overtime paid to managerial employees who operated Respondent's facilities during the strike which was in accordance with the terms of Respondent's Salary Reso-

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[1]The Reporter's Transcript is hereinafter referred to as "(R.Tr.____)"; the Clerk's Transcript is referred to as "(C.Tr.____)"; Trial Exhibits are referred to as "(Ex.____)".

lution, (Ex. 130), and accordingly reduced the damage award to $163,814.00. Slip op. 17-24.

## II.

## STATEMENT OF THE FACTS

Respondent is one of twenty-seven sanitation districts within Los Angeles County. Each such district is a separate and autonomous political subdivision of the State of California, authorized by *Health & Safety Code* § 4700 *et seq.* (West 1970 & Supp. 1983). (R.Tr. 11-13) County Sanitation District No. 2 of Los Angeles County is authorized by a joint powers agreement, (Ex. 120), to act on behalf of itself and the twenty-six other districts in numerous matters, including personnel and labor relations. (These twenty-seven sanitation districts are hereinafter jointly referred to as "the District").

The District operates sanitary landfills for the disposal of rubbish, sewage treatment plants and approximately 11,000 miles of sewer trunk lines. (R.Tr. 11-12, 260) The landfills in use in 1976 included the Palos Verdes, Puente Hills, Mission Canyon, Scholl Canyon, Spadra and Calabasas facilities, which together received about 15,000 tons of refuse each day. (R.Tr. 350) The eleven sewage treatment plants, which include the Long Beach Los Coyotes, Whittier Narrows, San Jose Creek, Pomona, Saugus, Valencia, Palmdale, Lancaster and La Canada water renovation plants, were processing 450 million gallons of raw sewage each day. (R.Tr. 261; Ex. 102 through Ex. 119) Most of these plants are upstream "feeders" to the Joint Water Pollution Control Plant ("JWPCP") located in Carson.[2] (R.Tr. 261) In maintaining these

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[2]The District maintained other facilities, such as maintenance yards in Palmdale, Compton and San Gabriel, the South Gate

operations, the District served approximately four million County residents. (R.Tr. 12)

The District's labor relations are governed by the Meyers-Milias-Brown Act, *Gov't Code* §§ 3500-3511 (West 1980 & Supp. 1983), and its Employee Relations Resolution, (Ex. 122), as authorized under that Act. Local 660 is a labor organization affiliated with the Service Employees International Union, AFL-CIO, which has represented the District's blue-collar employees since 1973. At all times pertinent Victor N. Hochee was the general manager of Local 660, (R.Tr. 23, 421), Harry Gluck was Local 660's manager of representational services, (R.Tr. 618, 622), and Jack Roberts was one of its field business representatives. (R.Tr. 412)

The District and Local 660 have bargained concerning the wages, hours and working conditions of the District's blue-collar employees, under the Meyers-Milias-Brown Act, since 1973. (R.Tr. 24-25) Each year[3] these negotiations resulted in a binding labor contract or Memorandum of Understanding ("MOU"). *See Glendale City Employees Ass'n v City of Glendale,* 15 Cal. 3d 328, 124 Cal. Rptr. 513, 540 P.2d 609 (1975), *cert. denied,* 424 U.S. 943 (1976).

Local 660 has struck in support of its collective bargaining demands on two occasions. In June 1974, Local 660 engaged in a five-day strike supported by virtually all the District's blue-collar employees. (R.Tr. 711, 936) Local 660's second strike, the subject of this lawsuit, lasted from July 5 through July 16, 1976. (R.Tr. 419-20) Despite approximately nineteen negotiation meetings

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Transfer Station and forty-six pumping stations, as well as a Joint Administrative Office ("JAO"). (R.Tr. 260-62)

[3]Prior to 1977, MOUs were one year in duration.

over a three and one-half month period prior to the 1976 strike, and the District's comprehensive, compromise proposals on June 23 and July 1, 1976, the parties were unable to reach agreement on the terms of a new MOU (R.Tr. 590-95), and Appellants went on strike.

Local 660 prepared for the 1976 strike well in advance of July 5, 1976, the date on which the strike began. Such preparations included the hiring of a media consultant; the purchase of newspaper ads; the preparation, stockpiling and distribution of picket signs; the written request to the Service Employees International Union and the Los Angeles County Federation of Labor for strike sanctions; the printing of brochures; the renting and equipping of local strike headquarters; the appointment of picket "captains"; the preparation of "hot-line" telephone messages;[4] and other strike-related activities. (R.Tr. 35-36, 420, 423-26, 598, 617; Exs. 126, 184, 187, 191, 192; C.Tr. 138-40, 158, 209-14)

Also before the strike began, employees attempted to sabotage vital equipment at the JWPCP, the District's main sewage treatment plant. Management personnel replacing blue-collar employees, shortly after 10:00 p.m. on July 5, discovered a sewage discharge line blocked with a plywood disc. Plant vehicles, their keys hidden in the hubcaps, were found blocking the entrance to the standby generator building. (Ex. 157) The battery cables to the standby generator had been cut. (Exs. 157, 175, 176)

On July 6, 1976, management personnel discovered a particularly dangerous condition in the large, sewage "digestion" tanks at the JWPCP. For two or three days

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[4]Local 660's "hot-line" consisted of pre-recorded telephone messages concerning the strike and negotiations. (See R.Tr. 420-21; Ex. 191; C.Tr. 167-72)

prior to the strike, employees had deliberately overfed the anaerobic bacteria in these tanks with sewage. This overfeeding caused a serious decrease in bacterial production of methane gas, which is used to power effluent pumps and other critical equipment at the JWPCP. The effluent pumps are necessary to prevent inflowing sewage from flooding the JWPCP in a manner that would severely incapacitate and damage the plant. Had these sabotage attempts not been uncovered, a disruption in the primary source of power in combination with the incapacitation of standby generators could have crippled a facility whose operation is critical to the health of the community. (R.Tr. 383, 833, 948; C.Tr. 136, 158-59, 183, 221)

During the strike, the pickets distributed leaflets and attempted to dissuade customers from using District facilities. (Exs. 183, 185; C.Tr. 158-59, 162-66) Entrances to District work sites were routinely strewn with roofing nails and broken glass; fences, gates and vehicles were damaged. (R.Tr. 325-30; Ex. 157)

Further, significant amounts of debris[5] were introduced into the sewer system immediately upstream from the JWPCP. Unless such debris is quickly removed from the mechanical rakes and screens, which prevent such flotsam from entering the JWPCP, the effluent flow would be dammed and the rakes damaged. (R.Tr. 262, 327-29) During the strike, this debris caused precisely such damage. *Id.*

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[5]Items retrieved from the inflowing sewer system included a mattress, tires, a canvas tarpaulin, upholstered cushions, carpeting and cabinet doors. (R.Tr. 328-29; Ex. 157, 158, 159) Such articles do not normally come down the sewer system, and never in such quantity. (R.Tr. 329); Slip op. 12-13.

Despite acts of sabotage and picket line problems, District operations were not significantly impaired. During the second week of the strike, discussions resumed and by Friday, July 16, 1976, the parties reached a tentative agreement on a new MOU, the terms of which were the same as the District's July 1, 1976 offer. (See Exs. 182, 335; R.Tr. 629) There has been no strike activity by the District's employees subsequent to July 1976. (R.Tr. 1012)

## III.

## ARGUMENT

### A. Absent Legislative Authorization, Public Employees Have No Right To Strike.

#### 1. At Common Law, Public Employees Have No Right To Strike.

Appellants' fundamental argument in their Petition for Hearing is that the legality of public sector strikes, in the absence of legislative authorization, is an open question in California, and that this Court should now expressly legitimate such strikes.

Appellants' first assertion that the legality of public sector strikes is an open question in this State is incorrect. The rule that public employee strikes are illegal, absent legislative authorization, was recognized by this Court in *Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen,* 54 Cal. 2d 684, 8 Cal. Rptr. 1, 355 P.2d 785 (1960), and has been applied thereafter with complete consistency by the Courts of Appeal, including the Court of Appeal in this case.[6] While

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[6]*See, e.g., International Brotherhood of Electrical Workers, Local Union 1245 v. City of Gridley,* 121 Cal. App. 3d 169, 175 Cal. Rptr. 274

the Court of Appeal noted that much has been written on the subject of labor relations in the public sector and the advisibility of granting public employees the right to strike, *see* slip op. 3-4, the Court correctly concluded that the rule barring public sector strikes in the absence of legislative authorization is and has been the law in this State.[7]

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(1981), *rev'd on other grounds,* 34 Cal.3d 191, 193 Cal. Rptr. 518, 666 P.2d 960 (1983); *Stationary Engineers v. San Juan Water District,* 90 Cal. App. 3d 796, 801, 153 Cal. Rptr. 666 (1979); *Pasadena Unified School District v. Pasadena Federation of Teachers,* 72 Cal. App. 3d 100, 140 Cal. Rptr. 806 (1977); *Service Employees' International Union, Local No. 22 v. Roseville Community Hospital,* 24 Cal. App. 3d 400, 408, 101 Cal. Rptr. 69 (1972); *Trustees of California State Colleges v. Local 1352, S.F. State etc. Teachers,* 13 Cal. App. 3d 863, 867, 92 Cal. Rptr. 134 (1970); *City of San Diego v. American Federation of State etc. Employees,* 8 Cal. App. 3d 308, 310, 87 Cal. Rptr. 258 (1970); *Almond v. County of Sacramento,* 276 Cal. App. 2d 32, 35, 80 Cal. Rptr. 518 (1969); *cf. San Diego Teachers' Ass'n v. Superior v. Superior Court,* 24 Cal. 3d 1, 154 Cal. Rptr. 893, 593 P.2d 838 (1979) (Public Employment Relations Board has exclusive initial jurisdiction for purposes of injunction to determine whether a strike by public school employee organizations recognized or certified as exclusive representatives is an unfair labor practice and what, if any, remedies PERB should pursue).

[7]There can be no suggestion, as Appellants imply, that the courts in this State somehow invented this common law prohibition against public sector strikes. Indeed, at common law, all strikes were deemed illegal and subject to injunction and suits for damages. *See Commonwealth v. Pullis,* Mayor's Court of Philadephia (1806) (Reported in 3 J. Commons, *Documentary History of American Industrial Society,* 59 (1910); *Walker v. Cronin,* 107 Mass. 555 (1871); *Vegelahn v. Guntner,* 67 Mass. 92, 44 N.E. 1077 (1896); *Loewe v. Lawlor (Danbury Hatters),* 208 U.S. 274 (1908). Congress, gradually, through a series of legislative enactments, not only granted private sector employees a right to strike and to engage in other concerted activities, but also deprived employers of their traditional remedies of injunction and damage suits. *See* 38 Stat. 730 (1914) (Clayton Antitrust Act), codified as amended at 15 U.S.C. §§ 15, 17, 26 (1970), 29 U.S.C. § 52

Nor are the California courts alone in recognition of this prevailing common law rule. As the United States District Court for the District of Columbia stated, with the approval of the United States Supreme Court:

> "At common law no employee, whether public or private, had a constitutional right to strike in concert with his fellow workers. Indeed, such collective action on the part of employees was often held to be a conspiracy. When the right of private employees to strike finally received full protection, it was by statute, Section 7 of the National Labor Relations Act, .... It seems clear that public employees stand on no stronger footing in this regard than private employees and that in the absence of a statute, they too do not possess the right to strike.... *It is fair to conclude that, irrespective of the reasons given, there is a unanimity of opinion in [sic] the part of courts and legislatures that government employees do not have the right to strike.*"

*United Federation of Postal Clerks v. Blount,* 325 F. Supp. 879, 882 (D.D.C. 1971), *aff'd,* 404 U.S. 802 (1971) (cita-

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(1970); 47 Stat. 70 (1930) (Norris-LaGuardia Act), codified at 29 U.S.C. §§ 101-15 (1970); 47 Stat., Part II 577 (1926) (Railway Labor Act), codified as amended at 45 U.S.C. §§ 151-88 (1970); 49 Stat. 449 (1935) (Wagner Act), codified as amended at 29 U.S.C. §§ 151-97 (1970). Several states, including California, enacted their own versions of the above federal statutes, granting and protecting private sector employees' rights to engage in strikes, picketing and other collective activities. *See, e.g., Labor Code* §§ 921-923 (West 1983). In summary, the common law prohibition against strikes of all types, whether by public or private sector employees, was not created by California's judiciary based upon public policy. Moreover, where the prohibition against strikes has been lifted, whether in the public or private sectors, it has been through legislative action. *See United Federation of Postal Clerks v. Blount,* 325 F. Supp. 879, 882 (D.D.C. 1971), *aff'd,* 404 U.S. 802 (1971).

tions omitted) (emphasis added). Even the most vocal advocates of a public employee right to strike recognize the long-standing rule, both at common law and as codified in various statutes, that strikes by public sector employees are illegal. *See, e.g.*, Hanslowe & Acierno, "The Law and Theory of Strikes by Government Employees," 67 *Cornell L. Rev.* 1055, 1059-61 (1982).

Appellants' contention that the legality of public sector strikes generally, or of the strike involved in this case, is somehow an open question is without legal basis. Although this Court has not addressed directly the legality of public employee strikes in the absence of legislative authorization since the *Railroad Trainmen* case, there is no doubt that Appellants request a sweeping and fundamental change in existing law.

**2. The Legislature Has Not Legitimated Public Employee Strikes Under The Meyers-Milias-Brown Act.**

The Meyers-Milias-Brown Act does not expressly or impliedly grant public employees a right to strike. As Professor, now Justice Grodin, recognized:

> "Evidence of legislative validation [of strikes under the Meyers-Milias-Brown Act] is difficult to find, particularly in light of section 3509 which specifically denies legislative intent to make the provisions of section 923 of the Labor Code applicable to public employees.[177]

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[177] *Cal. Labor Code* § 923 . . . protects, *inter alia*, the right of employees to engage in 'concerted activities for the purpose of collective bargaining or other mutual aid or protection.' This section protects the right to strike in the private sector."

Grodin, "Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts," 23 *Hastings L.J.* 719, 758 (1972) (citation omitted) (hereinafter cited as "Grodin at ____"). Section 3509 of the Government Code was thus clearly intended to dispel any inference that the Meyers-Milias-Brown Act gave public sector employees covered thereunder a right to engage in "other concerted activities," including a right to strike.[8] *See Los Angeles Metropolitan Transit Authority v. Railroad Trainmen,*

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[8]There is a similar provision in the Education Employment Relations Act ("EERA"), *Gov't Code* § 3549. In *San Diego Teachers Ass'n v. Superior Court*, 24 Cal. 3d 1, 154 Cal. Rptr. 893, 593 P.2d 838 (1979), this Court held that this provision "does not prohibit strikes but simply excludes the applicability of Labor Code Section 923's protection of concerted activities." 24 Cal. 3d at 13. This interpretation of Section 3549 by no means should be applied to Section 3509. The Court in *San Diego Teacher's Ass'n* reasoned that excluding applicability of Section 923 was necessary because of the legislative scheme of the EERA, as administered by the Public Employment Relations Board. Thus, the "wholesale introduction of rules protecting collective bargaining in the private sector into the public sector," 24 Cal. 3d at 6, would have conflicted with the comprehensive and detailed EERA.

Conversely, the Meyers-Milias-Brown Act, unlike the EERA, is not a comprehensive regulatory scheme. *See IBEW, Local 1245 v. City of Gridley, supra,* 34 Cal. 3d at 197 (citations omitted); J. Grodin, D. Wollett & R. Alleyne, *Collective Bargaining in Public Employment*, preface to first edition at xi (BNA) (3d ed. 1979). The potential for conflict between Section 923 of the *Labor Code* and the Meyers-Milias-Brown Act is therefore far less than the conflict considered in *San Diego Teachers' Ass'n.* Thus, interpreting Section 3509 the same as Section 3549, as being designed to avoid conflict between statutory schemes, would render Section 3509 largely superfluous. In any event, the distinction appears more semantical than real, since it is precisely the "wholesale introduction" of private sector strike protections into labor relations under the Meyers-Milias-Brown Act which Appellants seek. Section 3509 precludes this even if interpreted the same as Section 3549.

*supra* (right to engage in "other concerted activities" generally indicates a right to strike).

More fundamentally, the prohibition against public sector strikes had been recognized for years prior to the enactment of the Meyers-Milias-Brown Act in 1968. It would have been unnecessary expressly to prohibit by statute conduct which the common law already rendered illegal. Conversely, a provision such as Section 3509, designed to avoid any inference of a legislative change in the common law rule prohibiting public employee strikes, was clearly appropriate. Because of the common law rule, there was no need for the State Legislature in 1968 to address the issue of whether the Meyers-Milias-Brown Act should expressly prohibit strikes in the first instance.

Moreover, as this Court has recognized, the Meyers-Milias-Brown Act was the product of political compromise. *See IBEW, Local 1245 v. City of Gridley, supra*, 34 Cal. 3d at 197; *see also* Grodin at 761 ("[the Meyers-Milias-Brown Act] reflect[s] legislative indecision in the face of varying views and conflicting political forces."). Had the proponents of a right to strike been politically able to include such in the Meyers-Milias-Brown Act, they undoubtedly would have done so. The absence of an express grant of such a right in the statute leaves the inescapable conclusion that the Legislature did not intend such. Appellants' invitation to this Court to declare the strike in this case legal, thus seeks to achieve by judicial fiat what was politically unobtainable in the Legislature.

Nor is there any implication in the statute mandating a right to strike. It does protect the right of covered employees to join unions of their own choosing, and have those unions represent them in collective negotiations, concerning "wages, hours, and other terms and conditions

of employment." *Gov't Code* §§ 3503 & 3504 (West 1980). The statute also imposes an affirmative obligation on the public employer to "meet and confer in good faith" with such employee representatives. *Id.* at § 3505. Appellants apparently argue that the mandate to "meet and confer" necessarily implies resort to economic weapons such as strikes and picketing. This argument, however, proves too much.

Even those commentators generally favoring a grant of the right to strike to public sector employees recognize, as do Appellants, that in some cases the proposed right to strike must be denied. *See* Burton & Krider, "The Role and Consequences of Strikes by Public Employees," 79 *Yale L. J.* 418, 433 (1970) ("Despite arguments to the contrary, we feel that strikes in some essential services, such as fire and police, would immediately endanger the public health and safety and should be presumed illegal.") (hereinafter cited as "Burton & Krider at ____"); Grodin at 759 ("I tend to the view that a ban on strikes by public employees is both unwise and inequitable, unless it is limited to strikes which imperil public health or safety."). Similarly, some commentators have suggested mandatory or binding arbitration as a final step in public sector collective bargaining, in lieu of a right to strike. *See, e.g.,* Grodin, "Political Aspects of Public Sector Interest Arbitration," 64 *Cal. L. Rev.* 678 (1976). Clearly, therefore, if meaningful public sector bargaining can occur in the absence of a strike threat, as these commentators recognize, there is certainly no implication that the "meet and confer" requirement of the Meyers-Milias-Brown Act implicitly sanctions a right to strike.

### 3. The Grant By This Court Of A Right Of Public Sector Employees To Strike, Even As Limited By Appellants, Involves Substantial Policy Questions, More Appropriately Resolved By The Legislature

Neither Appellants nor responsible commentators who favor public sector strikes, advocate an unfettered, absolute right to strike. Instead, Appellants propose a "clear and present danger" test as a limitation upon strikes under the Meyers-Milias-Brown Act. Under this test, any such strike would be a legitimate means of economic coercion, unless and until a showing could be made to the superior court that continuation of the strike would pose a clear and present danger to public health or safety.[9]

This proposed test is seriously deficient in a variety of respects. First and foremost, there is absolutely no justification for Appellants' position, which effectively establishes the courts of this State as the primary arbiters of when and whether a public sector strike under the Meyers-Milias-Brown Act is legal. The West Virginia Supreme Court has stated the problem succinctly:

> "[I]n most other states the legislature has made an effort to make some statutory accommodations to the labor relation problems that exist in the public sector. Indeed, it was the initial inability of the courts to judicially resolve [sic] the competing interests of private employees and private employers that led to federal legislation in the labor law field. Most if not all commentators in the labor law area agree that the

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[9]While their position is unclear, Appellants would apparently justify even a strike which endangers public health or safety, if it is in response to a public employer's unfair labor practices under the Act. *See* Petition for Hearing at 24-25. The effect of a public employer's "bad faith" under the Act is discussed in Part C(2).

> complex issues in this field are ill suited to any comprehensive judicial solution."

*City of Fairmont v. Retail etc. Union,* 283 S.E.2d 589, 595 (W.Va. 1981).

Mr. Justice Brandeis, in his dissent in *Duplex Printing Press Co. v. Deering,* 254 U.S. 443 (1921), voiced similar views. Criticizing the majority in that case for failing to give effect to sections of the Clayton Antitrust Act, 15 U.S.C. §§ 15, 17, 26 (1970), a congressional attempt to exempt certain union activities from the reach of the Sherman Antitrust Act, he stated:

> "All rights are derived from the society in which they exist; above all rights rises duty to the community. The conditions in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest, and to declare the duties which the new situation demands. This is the function of the legislature, . . . ."

254 U.S. at 488, quoted with approval in *Seven Up Bottling Co. v. Grocery Drivers Union Local 848,* 40 Cal. 2d 368, 377 (1953). As noted above, the grant and protection of the right to strike, both in the public and private sectors, has virtually always been accomplished through legislative action. Accordingly, the question is whether the courts are the appropriate forum in which the complex, policy questions surrounding public sector labor relations should be resolved. Given the fact that the common law prohibition against public sector strikes is supported by unanimous judicial precedent, which the Legislature has

not seen fit to overrule,[10] Respondent submits that these questions are most appropriately directed to this State's policy-making body, the Legislature.

Also of significance is what Appellants' proposed test does not address. Appellants apparently suggest that a "clear and present danger" test be the only restriction on public sector strike activity. In the absence of a danger to public health or safety, Appellants would reason, a strike by public employees covered by a Meyers-Milias-Brown Act would be legal. Such could include secondary boycotts or strikes to force a public employer to recognize a particular union as the representative of certain employees, strikes which in the private sector could well be illegal. *See* 29 U.S.C. § 158(b)(4) and (7)(C) (1970). The proposed "clear and present danger" test fails to deal in any way with the complex questions of whether the means or objectives of a strike by public employees might render it illegal, in the absence of a risk to health or safety. Thus, any declaration that some public sector strikes under the Meyers-Milias-Brown Act may be legal necessarily entails, at some point, judicial resolution of these complex policy questions involving intricate balancing of competing interests in public sector labor relations entirely without legislative guidance,[11] or an expert agency, such as the National Labor Relations Board or the Public

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[10]Legislation in California regarding public sector labor relations has been substantial. In addition to the Meyers-Milias-Brown Act, *see, e.g.*, EERA, *Gov't Code* § 3540 *et seq.* (West 1980 & Supp. 1983); Higher Education Employer-Employee Relations Act, *Gov't Code* § 3560 *et seq.* (West 1980 & Supp. 1983); State Employer-Employee Relations Act, *Gov't Code* § 3512 *et seq.* (West 1980 & Supp. 1983). Despite these substantial legislative schemes, the Legislature has steadfastly refused to grant public sector employees a right to strike akin to that of private sector employees.

[11]*See* footnote 8, *supra.*

Employment Relations Board. In summary, the blanket authorization of public sector strikes under the Meyers-Milias-Brown Act, even as Appellants would limit it, would open a veritable Pandora's Box of policy issues more appropriately addressed to the State Legislature.

## B. There Is No Constitutional Right To Strike

Appellants also argue that the right to strike is of constitutional dimensions, relying primarily on guarantees in the California Constitution of freedom of speech and assembly, and of equal protection of the law. California courts have rejected similar contentions on numerous occasions.

In *Pasadena Unified School Dist. v. Pasadena Federation of Teachers, supra*, the court, after extensive discussion of the relevant case law, concluded:

> "The foregoing authorities support the constitutionality of even prior restraint upon speech advocating an illegal strike by public employees. If such prior restraint is permissible, a fortiori the restraining effect of subsequent liability for damages which plaintiff here seeks to impose does not violate defendants' free speech rights."

72 Cal. App. 3d at 110; *see also, City and County of San Francisco v. Evankovich*, 69 Cal. App. 3d 41, 137 Cal. Rptr. 883 (1977); *Los Angeles Unified School District v. United Teachers*, 24 Cal. App. 3d 142, 100 Cal. Rptr. 806 (1972). Thus, the courts in this state have never held that the common law prohibition of public sector strikes infringes upon free speech guarantees.

The court in *City of San Diego v. American Federation of State etc. Employees Local No. 127, supra*, after assuming that the right to strike was a "fundamental interest"

under traditional equal protection analysis, unequivocally rejected an equal protection argument similar to that advanced by Appellants here. The court noted:

> "[The Union] argues the rule of law denying a gardener on a public golf course the right to strike while affording a gardener on a private golf course that right, does not serve a compelling state interest. The reasons for the law denying public employees the right to strike while affording such right to private employees are not premised on differences in types of jobs held by these two classes of employees but upon differences in the employment relationship to which they are parties. *The legitimate and compelling state interest accomplished and promoted by the law denying public employees the right to strike is not solely the need of a particular governmental service but the preservation of a system of government in the ambit of public employment and the proscription of practices not compatible with the public employer-employee relationship.*"

8 Cal. App. 3d at 315 (citation omitted) (emphasis added). Of course, the instant case involves not a "gardener on a public golf course," but employees whose work directly affects the health and welfare of four million citizens of this State. Thus, Appellants' argument is even less persuasive than that rejected in *City of San Diego.*[12]

In sum, Appellants' constitutional arguments that public employees are entitled to strike have never been accepted by the courts, and must be rejected here. No

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[12]As more fully set forth in Part C, *infra*, the strike in this case would be illegal even were Appellants correct that an absolute ban on public sector strikes is unconstitutional, as it placed at substantial risk the public health.

hearing before this Court is needed for further argument on these issues.

### C. Assuming, Arguendo, Employees Under The Meyers-Milias-Brown Act May Have A Limited Right To Strike, The Strike In This Case Was Nevertheless Illegal.

#### 1. The Strike In This Case Placed At Substantial Risk The Health Of The Community.

As noted above, no responsible advocate of a right to strike, whether in the public or private sector, has endorsed an unfettered right to engage in such conduct. For example, Mr. Justice Brandeis stated "[n]either the common law, nor the [Constitution], confers the absolute right to strike." *Dorchy v. Kansas*, 272 U.S. 306, 311 (1926). Moreover, both commentators and state legislatures addressing the issue have agreed to the necessity of prohibiting strikes which endanger the public health or safety. *See* Grodin at 759; Petition for Hearing at 9-10 n. 9. The facts in the instant case clearly demonstrate that any strike against the District by Appellants puts at substantial risk the health of four million citizens of this State.

The arguments in favor of allowing public sector employees a right to strike are predicated primarily upon the notion that strikes are a necessary ingredient for meaningful bargaining. Without such a right, some argue, the public sector union has no means of applying pressure to the public entity, and public employers have no incentive to engage in serious collective bargaining.

The implicit premise of this argument is the fundamental truth that the intent of any economic[13] strike is to pressure the employer by either inhibiting or stopping its ability to operate. *See* Burton & Krider at 419-20. If an employer can continue to operate during a strike, it has less incentive to "sweeten" its offer at the bargaining table.

In the instant case, there is abundant evidence within the record that impairing or completely curtailing the District's ability to operate its landfills and sewage treatment plants was precisely Appellants' objective. Wholly apart from picketing and distribution of leaflets urging landfill users not to utilize the District's facilities, the evidence demonstrated substantial and sophisticated sabotage attempts, primarily directed toward the District's large sewage processing plant, the JWPCP. *See* discussion at pp. 6-7, *supra.*

Had Appellants been successful in their express intent to shut down the District's sewage treatment plants, *see* (Ex. 191), over four billion gallons of raw sewage could have been discharged into the Pacific Ocean. The consequences of such an occurrence would be disastrous. *See, e.g., State of California v. City and County of San Francisco,* 94 Cal.App.3d 522, 156 Cal.Rptr. 542 (1979) (six-day sewage worker strike — court detailed the incalculable harm the discharge of four hundred twenty-six million gallons of sewage caused, a mere one-tenth of the amount potentially involved here); *Caso v. District Council 37,*

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[13]The term "economic" used in describing Appellants' strike, refers only to the fact that it concerned wages and other terms and conditions of employment. There is, of course, substantial debate as to whether there is a distinction between economic pressure on a private employer and political pressure on a public employer, by means of a strike. *See* Burton & Krider at 428-33.

*American Federation etc. Municipal Employees,* 43 App. Div. 2d 159, 350 N.Y.S. 2d 173 (1973) (sanitation strike resulted in discharge of one billion gallons of untreated sewage into East River); (R.Tr. 330-34, 327, 358; Ex. 189, Ex. 183) Furthermore, had the employees been successful in the attempted sabotage of the JWPCP, and this facility had flooded with inflowing sewage, substantial damage to equipment could have rendered it completely inoperable.

Any declaration by this Court that the strike in this case was in any manner legitimate, thus necessarily permits Appellants to engage in conduct which has as its objective incalculable risk to the health of millions of citizens and to the ecology.

Appellants, in proposing their "clear and present danger" test, essentially argue that the strike in the instant case should have been illegal and subject to injunction only if it had been effective in closing down the District's facilities. Since the strike was ineffective, Appellants contend that it was not illegal. *See* Petition for Hearing at 18. Appellants' apparent position is completely at odds with their extended argument concerning the desirability of a right to strike.

The central theme in the Petition for Hearing is that public sector bargaining is meaningless without an effective, credible strike threat. Appellants then suggest a rule which would allow them to engage only in ineffective strikes. Certainly, the threat of an unsuccessful strike puts no more pressure on a public employer than does the complete absence of a strike threat. Thus, Appellants' proposed "clear and present danger" test completely undercuts their own policy arguments for legitimating public sector strikes.

Moreover, Appellants' analysis overlooks critical facts in this case. As noted, employees attempted to sabotage

the JWPCP. Had these attempts been successful, no amount of *ex post facto* judicial intervention could have rendered the JWPCP immediately operable. The strike may have been enjoined under Appellants' proposed rule, but that would not have stopped the irreparable harm to the public which would already have occurred. Furthermore, Appellants ignored the injunctions of both the 1974 and 1976 strikes. There is no reason to suppose that they would comply with an injunction entered after a judicial determination that their conduct constituted a "clear and present danger" to the health of the community.

Appellants' suggestion that no injunction would have been appropriate in this case under their "clear and present danger" test, ignores the purpose of any injunction, which is to avoid irreparable harm. It is the potential harm that is significant. If Appellants' test were appropriately applied, therefore, any strike against the District would be illegal and subject to injunction, since any such strike would involve substantial risk to millions of citizens. In sum, this strike was illegal even under Appellants' proposed analysis.

**2. A Public Employer's Lack Of Good Faith Under The Meyers-Milias-Brown Act Is Not A Justification For A Strike; In Any Event, The District Met And Conferred In Good Faith**

Appellants would also justify, on a theoretical level, strike conduct in response to bad faith under the Meyers-Milias-Brown Act. This theoretical justification is neither legally sufficient nor factually supported in this case.

The courts of this state have uniformly rejected the notion that a public agency's lack of good faith in "meet-

ing and conferring" under the Meyers-Milias-Brown Act[14] justifies illegal strike activity. In *Stationary Engineers Local No. 39 v. San Juan Suburban Water District, supra,* the court categorically stated:

> "[U]nder California law public employees have no right to strike whether their employer violates the Meyers-Milias-Brown Act or not."

90 Cal. App. 3d at 801 (citation omitted); *see also Los Angeles Unified School District v. United Teachers, supra; Trustees of California State Colleges v. Local 1352, supra; City of San Diego v. American Federation of State etc. Employees, supra; Almond v. County of Sacramento, supra; see generally, City and County of San Francisco v. Evankovich, supra,* 69 Cal. App. 3d at 47-48, and cases cited there; *Gov't Code* § 3509 (West 1980). Furthermore, Appellants have a judicial remedy for bad faith, through mandamus proceedings. *See Placentia Fire Fighters, Local 2147 v. City of Placentia,* 57 Cal. App. 3d 9, 129 Cal. Rptr. 126 (1976).

Even assuming that the failure to confer in good faith might, in some instances, constitute a defense or justification for otherwise illegal strike activity, such a theory has no application in this case. Indeed, the record conclusively demonstrates the District's good faith under the Myers-Milias-Brown Act.[15] There is no evidence that the

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[14]The requirement that parties "meet and confer" is less comprehensive than a requirement to engage in "collective negotiations" or "bargaining." *See* Grodin at 730-31 n. 56. Thus, even though Appellants reference meeting and conferring under the Meyers-Milias-Brown Act as "bargaining" or "negotiating," this characterization is not wholly accurate.

[15]As Justice Reynoso stated in his concurring opinion in *Stationary Engineers v. San Juan Suburban Water Dist., supra,* 90 Cal. App. 3d at

District ever failed or refused to "meet and confer in good faith regarding wages, hours, [or] other terms and conditions of employment." *Gov't Code* § 3505 (West 1980). There is no evidence that the District was not seriously trying to reach an agreement. The Trial Court expressly found that the District

> "and its authorized representatives met and conferred in good faith, and met promptly, upon request, for a reasonable number of times, and exchanged proposals and concessions in a good faith attempt to arrive at the terms of a negotiated Memorandum of Understanding, both prior to and after the July 5, 1976 inception of the aforementioned strike activities."

(C.Tr. 483) The Trial Court further concluded as a matter of law that the District "met and conferred in good faith with [Local 660] . . . and at no time was . . . guilty of unclean hands." (C.Tr. 486)

Appellants' allegations of bad faith rest on two contentions. First, Appellants imply that the District's proposals, including an alleged pay cut, were substantively unacceptable, and therefore in bad faith. Second, Appellants claim that the District's condition on its July 1 offer[16] that Local 660's negotiating committee recommend

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805, the finding of good faith is one of fact, and must be upheld if supported by substantial evidence.

[16]Prior to the strike, on June 23, 1976, the District proposed a comprehensive, compromise offer, which Local 660 rejected. (R.Tr. 163-66) On July 1, 1976, the District offered a package of economic and other concessions beyond those of June 23, (R.Tr. 246-47), conditioned on recommendation by Local 660's negotiating committee of acceptance to the membership. Local 660 initially rejected this July 1 offer, the offer which it ultimately accepted on July 16. (R.Tr. 169-73, 593, 625-26)

this offer to the District's employees was in bad faith. Neither of these allegations has any factual or legal substance.

Proposal of a pay cut does not establish bad faith. In *Placentia Fire Fighters, Local 2147 v. City of Placentia, supra,* for example, the plaintiff labor union sought to show the defendant city's bad faith based, *inter alia,* on its proposed reduction of hours from sixty-seven to forty per week and elimination of certain fringe benefits. The court rejected this argument, reasoning that the Meyers-Milias-Brown Act contains "the right to remain firm." 57 Cal. App. 3d at 22; *see also, Los Angeles Met. Transit Authority v. Railroad Trainmen, supra,* 54 Cal. 2d at 693. This right is also contained in the National Labor Relations Act, 29 *U.S.C.* § 158(d), which expressly excludes from the duty to bargain in good faith any obligation of "either party to agree to a proposal or . . . [to] mak[e] a concession." Appellants would apparently involve the courts in evaluating whether a proposal under the Meyers-Milias-Brown Act was substantively sufficient or acceptable, essentially placing the courts in the role of final arbitrator of such proposals. Contrary to Appellants' assertions, the courts should not be involved in evaluating the merits of proposals for MOUs. In any event, neither the District's June 23 offer nor its July 1 offer would have resulted in a pay cut. (R.Tr. 148-49, 240-42, 619, 628-29, 1049; *see* Ex. 182, Ex. 355) Appellants' first contention is, therefore, wholly without merit.

Appellants' second contention is little more than a conclusory, unsupported statement. Appellants cite no authority, nor is there any, for the novel proposition that conditioning an offer on recommendation of acceptance constitutes a failure to meet and confer in good faith under the Meyers-Milias-Brown Act. Furthermore, there

is no evidence in the record that striking employees in this case even knew of the condition. Logically, therefore, the strike could not have been in response to this conduct. The conditional offer cannot function as a justification for Appellants' conduct, even were it in bad faith.

In sum, even were this Court to find that some strikes under the Meyers-Milias-Brown Act are permissible, the potential that strikes such as that in the instant case might cause substantial harm to the public health and welfare, would render the strike herein illegal, regardless of whether the District met and conferred in good faith. Moreover, the trial court's findings that the District met and conferred in good faith are correct and supported by substantial evidence. The Court of Appeal's decision was therefore correct, obviating any need to grant the Petition for Hearing herein.

### D. The Award Of Tort Damages Is An Appropriate Remedy For Appellants' Strike Activity.

Appellants' illegal strike caused the District monetary damages. Such damages were expenses incurred in the District's successful attempt to mitigate the incalculable harm which would have resulted had Appellants been able to prevent the District's landfills and sewage treatment plants from operating.

The Meyers-Milias-Brown Act provides neither remedies for illegal strikes nor an administrative tribunal to determine and impose appropriate sanctions for such conduct. This is not a case, therefore, where the Legislature has changed common law remedies or preempted a judiciary's authority to apply such, *see Lamphere Schools v. Lamphere Federation of Teachers,* 400 Mich. 104, 252 N.W. 2d 818 (1977) (holding court's authority to impose a damage remedy for illegal strike preempted by legisla-

tive action), nor is this case in a jurisdiction where there is no prior, common law tort damage remedy for an illegal strike. *See City of Fairmont v. RWDSU, supra.*

As discussed above, private sector unions and employees were subject both to injunctions and suits for damages for economic strike activities under various common law and statutory theories. *See* footnote 7, *supra.* Private sector unions are currently subject to the sanction of damages and injunctive relief for breach of collective-bargaining agreements, *see Boys' Markets, Inc. v. Retail Clerks Union,* 398 U.S. 235 (1970); 29 *U.S.C.* § 185 (1970), and for certain types of strike activities. 29 *U.S.C.* § 158(b)(4), 160(1) & 187 (1970).

The courts in this State have expressly recognized that "[t]he conduct of an unlawful strike is itself a tort for which damages may be recovered." *Pasadena Unified School District v. Pasadena Federation of Teachers, supra; see also State of California v. City and County of San Francisco, supra* (recovery of civil penalties for strike-caused damage against both employer and striking sanitation union); *cf. Caso v. District Council 37, supra* (tort damages awarded to municipalities injured by discharge of untreated sewage against striking sanitation union).

This common law remedy also finds support in this Court's decision in *El Rancho Unified School District v. National Education Ass'n,* 33 Cal. 3d 946, 192 Cal. Rptr. 123, 663 P.2d 893 (1983). The "principal issue" in that decision was

> "whether EERA divests a superior court of jurisdiction to entertain a school district's tort suit for damages arising out of a teachers' strike led by noncertified unions."

33 Cal. 3d at 953. This Court held that the Legislature, through the EERA, had preempted such jurisdiction. Were Appellants' assertions correct, that there is no common law, tort damage remedy for illegal strike activity, this Court's extensive discussion of preemption in *El Rancho* would have been pointless and superfluous. In the absence of a prior tort remedy, there would have been no jurisdiction in the first instance for the Legislature to preempt. In short, the award of tort damages for Appellants' illegal conduct is sanctioned by the common law in this State.[17]

The question thus becomes, as with the question of the legality of the strike in this case, whether this Court should change the common law allowance of damages for the illegal conduct in this case.[18] This Court has recognized:

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[17]Appellants argue that this Court's decision in *City and County of San Francisco v. Cooper,* 13 Cal. 3d 898, 120 Cal. Rptr. 707, 534 P. 2d 403 (1975), is inconsistent with a tort remedy for illegal strikes. In fact, *Cooper* held that the courts had no jurisdiction to decide whether the City and County of San Francisco were motivated by the illegal strike in that case, in their legislation concerning wages of striking public employees. Conversely, the courts below in this case clearly had jurisdiction to decide whether the District's damages were caused by Appellants' illegal strike.

[18]Appellants arguments in this regard are entirely inconsistent. Appellants concede that the remedy of injunction, at least in some instances, is appropriate, even though the Legislature has not expressly approved this remedy. Appellants suggest no basis, nor is there any, to distinguish among the various, common law remedies for illegal strike activity, none of which has received express, legislative approval in the Meyers-Milias-Brown Act.

Appellants also argue that the question of whether tort damages are available for otherwise illegal strike activity, citing this Court's decision in *City and County of San Francisco v. Cooper, supra,* should be resolved by the Legislature, while at the same time vigorously

> "The question as to what sanctions should appropriately be imposed on public employees who engage in illegal strike activity is a complex one which, in itself, raises significant issues of public policy."

*City and County of San Francisco v. Cooper, supra,* 13 Cal. 3d at 917. This Court should not, therefore, abandon the sanction of tort damages in the absence of direction from the Legislature on this complex question.[19]

Were this Court nevertheless to undertake determination of the appropriateness of the remedy in this case, and independently evaluate this complex policy question, it should find that the award of such damages for illegal strike activity under the Meyers-Milias-Brown Act should continue as a remedy. This Court has impliedly sanctioned both judicial and "self-help" remedies available to a public employer faced with illegal strike activity. In *IBEW, Local 1245 v. City of Gridley, supra,* in the course of holding that revocation of a labor organization's status

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asserting that the more fundamental and complex policy question of whether public sector employees should have a right to strike in the first instance, is appropriate for judicial solution. Contrary to Appellants' inconsistent assertions, changes in the common law rule prohibiting public sector strikes, and in the common law allowance of tort damages for such strikes, are both legislative questions.

[19]It should be noted that the Legislature has not responded to the Court of Appeal's holding in *Pasadena Unified School District v. Pasadena Federation of Teachers, supra.* Significantly, the Legislature has not hesitated to overturn Court of Appeal interpretations of the Meyers-Milias-Brown Act, with which it disagreed. *Compare, Rae v. Bay Area Rapid Transit Supervisory and Professional Ass'n,* 114 Cal. App. 3d 147, 170 Cal. Rptr. 448 (1980); *City of Hayward v. United Public Employees,* 54 Cal. App. 3d 761, 126 Cal. Rptr. 710 (1976) (construing the Meyers-Milias-Brown Act to prohibit requirement of "agency" fees as a condition of employment), *with Gov't Code* § 3502.5 (West Supp. 1983) (permitting negotiation of agency shop agreement).

as recognized, majority representative of certain public employees was unavailable as a self-help remedy under the Meyers-Milias-Brown Act, the Court stated:

> "Nor can the city contend that it is without other remedies in the strike context. In the past, numerous sanctions which do not interfere with workers' legitimate rights under the [Meyers-Milias-Brown Act] have been imposed in response to illegal strikes or strikes in violation of contract [including] . . . [injunctive relief]; . . . [and dismissal of striking employees]."

34 Cal. 3d at 204. The Court went on to hold that in dismissing striking employees, the public agency had to comply with constitutional, due process safeguards. *Cf. Arnett v. Kennedy,* 416 U.S. 134 (1974). Nevertheless, this Court clearly indicated that both the judicial remedy of injunction and the self-help remedy of dismissal of striking employees, were available to the public employer in response to an illegal strike, consistent with the policies of the Meyers-Milias-Brown Act, such as employee freedom of choice in selection of a collective-bargaining representative, and "full communication between public employers and their employees. . . ." *Gov't Code* § 3500 (West 1980). The remedy of tort damages is also consistent with these policies.

Another general purpose of the Meyers-Milias-Brown Act is the "improvement of personnel management and employer-employee relations." The court in *Lamphere Schools v. Lamphere Federation of Teachers, supra,* stated that recognition of a tort remedy "would encourage . . . inaction. Eventual settlements [of public labor disputes] could be prolonged pending the resolution of multiple tort claims and counterclaims. The inevitable result would be to create labor law log jams in our courts, and at the same

time, to exacerbate labor management disputes." 252 N.W. 2d at 830. The practical experience in the private sector is precisely the opposite of the *Lamphere* Court's conclusory statement.

This Court may take judicial notice that labor relations in the private sector tolerate substantial litigation, including tort actions for illegal strike activities before state and federal courts, and unfair labor practice proceedings before the National Labor Relations Board, very often continuing for years following the strike which engendered the litigation. Given this extensive judicial and administrative confrontation in the private sector, there is no basis for singling out a particular type of litigation in the public sector as inconsistent with harmonious labor relations. If Appellants truly desire to import strikes and other confrontation tactics prevalent in the private sector into public employee bargaining, they certainly cannot be heard to complain that court litigation inflames labor-management relations to a greater extent than their proposed economic warfare.

Moreover, the remedies which this Court has approved, and in which Appellants would acquiesce, the labor injunction and the dismissal of striking employees, are themselves arguably less conducive to labor relations harmony than is the tort remedy involved in this case. Discharge of striking employees not only exacerbates their relationship with the employer, it ends it. Indeed, this Court has impliedly termed "draconian" the remedy of mandatory dismissal of illegally striking public employees. *City and County of San Francisco v. Cooper, supra,* 13 Cal. 3d at 917. Similarly, it is hardly supportable that jail sentences for union officials, clearly a potential punishment for contempt, would render subsequent labor relations less turbulent than would tort litigation.

Appellants themselves argue that prohibition of strikes by public sector employees is a primary cause of discordant labor relations, which prohibition they concede to be permissible, through use of the labor injunction.

In short, the invocation of labor peace clearly does not justify dispensing with the heretofore recognized common law remedy of tort damages for Appellants' illegal conduct. There is no basis for declaring unavailable this traditional, common law remedy for Appellants' illegal strike. The Petition for Hearing should therefore be denied.

**E. The Court Of Appeal's Findings Sustaining The Superior Court's Damage Award Were Correct.**

Appellants renew in this Court their claims of error in the Superior Court's findings that the District's response to Appellants' illegal strike activity was reasonable and appropriate. Primarily, Appellants attack the level of staffing at the District's facilities during the strike. This assertion of error has no merit.

The basis for the District's damage claim is its right to recover the cost of reasonable actions taken to avoid the potentially harmful effects of Appellants' strike. *See* 23 *Cal. Jur.* 3d, Damages §§ 40-42 (1982); *see also, Barnes v. Berendes,* 139 Cal. 32, 72 Pac. 406 (1903), *modifying on other grounds,* 139 Cal. 39, 69 Pac. 491 (1902). It is axiomatic that the determination of whether the cost of mitigating damages was "reasonable" is a question of fact. *See Green v. Smith,* 261 Cal. App. 2d 392, 397, 67 Cal. Rptr. 796 (1968).

The handful of alleged occurrences at a few of the District's smaller, more isolated facilities, from which Appellants infer that management personnel were not always working during the strike, is hardly sufficient to

overcome the Superior Court's findings of fact. Moreover, the twenty-four hour staffing of District facilities was appropriate, in light of the strike-related vandalism and sabotage which occurred both during the 1974 and 1976 strikes. Payment of wages for all hours worked, including time which management employees spent sleeping, was entirely consistent with the District's Salary Resolution. (Ex. 130) *See Armour & Co. v. Wantock,* 323 U.S. 126 (1944); *Skidmore v. Swift,* 323 U.S. 134 (1944). Without belaboring the obvious, this finding of fact is supported by substantial evidence, and certainly does not constitute a significant question to which this Court should address itself. The requested Hearing on this issue should therefore be denied.

## F. The Superior Court's Award of Prejudgment Interest Was Appropriate.

Appellants also claim error in the Superior Court's award of prejudgment interest. The Court of Appeal was correct in its holding that the damages in this case were liquidated, and therefore appropriately affirmed the award of prejudgment interest under Section 3287(a) of the Civil Code. The District's damages were proved by invoices for guard services, equipment, meals etc., and wages paid to management and supervisorial personnel, replacing striking employees. The fact that the damages initially claimed were greater than those ultimately awarded, and were reduced by several "offsets," is completely irrelevant to whether damages were liquidated under Section 3287(a). *See Lineman v. Schmid,* 32 Cal. 2d 204, 212, 195 P.2d 408 (1948) and cases cited there; *Leaf v. Phil Rauch, Inc.,* 47 Cal. App. 3d 371, 120 Cal. Rptr. 749 (1975); *Coleman Engineering Co. v. North American Aviation,* 65 Cal. 2d 396, 55 Cal. Rptr. 1, 420 P.2d 713 (1966).

Moreover, the Superior Court had discretion to award prejudgment interest even in the absence of calculable certainty in the damage award under Section 3288 of the Civil Code. *See Greater Westchester Home Owners' Ass'n v. City of Los Angeles,* 26 Cal. 3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329 (1979), *cert. denied,* 449 U.S. 820 (1980); *Bullis v. Security Pacific National Bank,* 21 Cal. 3d 801, 148 Cal. Rptr. 22, 582 P.2d 109 (1978); *Levy-Zentner Co. v. Southern Pacific Transportation Co.,* 74 Cal. App. 3d 762, 769 & n.28, 142 Cal. Rptr. 1 (1977). In the clear absence of any showing by Appellants that the Superior Court abused its discretion in awarding prejudgment interest, that award must be upheld, even were the damages not liquidated in this case.

## CONCLUSION

Appellants' Petition for Hearing is essentially a request to this Court to overturn long-standing, common law rules prohibiting public sector strikes and allowing tort damages against unions and their agents who engage in such conduct. As these are both appropriately legislative issues, this Court need not review the Court of Appeal's decision, which is entirely consistent with these common law rules.

Even were there a right to strike under the Meyers-Milias-Brown Act, this case falls beyond the pale of any conceivably legitimate strike activity. The District's activities are absolutely essential to the health of over four million Los Angeles County residents. Further, even assuming the District's "bargaining" conduct were relevant to the legality of the strike, the evidence clearly demonstrates the District's good faith.

The Superior Court's other findings of fact are supported by substantial evidence, including findings that

the District's response to the illegal strike was reasonable. Lastly, the award of prejudgment interest was entirely appropriate, both as a matter of the Superior Court's sound discretion and as a matter of law.

For all the foregoing reasons, this Court should refuse to grant a hearing herein.

Dated: December 1, 1983

Respectfully submitted,

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2nd Civil No. 66088

(CERTIFICATE OF SERVICE BY MAIL —
Section 2015.5, C.C.P.)

JACQUELINE YUKAWA certifies that she is a citizen of the United States, over 18 years of age, a resident of the County of Los Angeles, and not a party to the within action; that her business address is Musick, Peeler & Garrett, One Wilshire Boulevard, Suite 2100, Los Angeles, California 90017; that on the 1st day of December, 1983, she served the within Answer to Petition for Hearing on the following named parties in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record as follows:

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GEFFNER & SATZMAN
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Los Angeles County Superior Court
111 N. Hill Street
Los Angeles, CA 90012
(For: Hon. CHARLES H. OLDER)

CLAY ROBBINS, Clerk
Court of Appeal
Second Appellate District
Division Four
3580 Wilshire Boulevard
Los Angeles, CA 90010

STEVEN A. DIAZ, Esq.
Deputy City Attorney
City & County of San Francisco
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and by then sealing said envelope and depositing the same, with postage thereon fully prepaid in the United States mail at Los Angeles, California; that there is a delivery service by United States mail at the place so addressed, or there is a regular communication by United States mail between the place of mailing and the place so addressed.

I certify under penalty of perjury that the foregoing is true and correct.

Dated at Los Angeles, California
December 1, 1983

JACQUELINE YUKAWA

# APPENDIX E

APPENDIX E

L.A. 31850

# In the Supreme Court of the State of California

L.A. 31850
(Superior Ct. No. C-166-219)

COUNTY SANITATION DISTRICT NO. 2
OF LOS ANGELES COUNTY,
a public agency,
*Plaintiff and Respondent,*
VS.
LOS ANGELES COUNTY EMPLOYEES ASSOCIATION,
LOCAL 660, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO, *et al.,*
*Defendants and Appellants.*

## ANSWER TO PETITION FOR REHEARING

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L.A. 31850

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

L.A. 31850
(Superior Ct. No. C-166-219)

COUNTY SANITATION DISTRICT NO. 2
OF LOS ANGELES COUNTY, a public agency,

*Plaintiff and Respondent,*

vs.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION,
LOCAL 660, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO, et al.,

*Defendants and Appellants.*

## ANSWER TO PETITION FOR REHEARING

*To The Honorable Rose Elizabeth Bird, Chief Justice, And To The Honorable Associate Justices Of The Supreme Court Of The State Of California:*

COMES NOW, Defendant and Appellant Los Angeles County Employees Association, Local 660 and herewith submits its Answer to the Petition for Rehearing on file herein.

## PRELIMINARY STATEMENT

Plaintiff and Respondent County Sanitation District No. 2 of Los Angeles County ("Plaintiff" or "District") has filed a Petition for Rehearing on the grounds that: (1) the Court misapplied its new standard for determining the legality of public sector strikes to the facts in the instant case, (2) the Court's new standard for determining the legality of public sector strikes as applied to the

District's employees interferes with the District's obligations under federal law, and (3) the Court should remand the case to the Superior Court to take evidence under the new standard for determining the legality of public sector strikes. Plaintiff's arguments are without merit and, accordingly, the Court should summarily deny the Petition for Rehearing.

## ARGUMENT

### I

### The Court Correctly Concluded That Under the New Standard for Determining the Legality of Public Sector Strikes, the Strike in the Instant Case Was Legal.

The Court announced the following standard to be used in determining the legality of a public sector strike:

> "Strikes by public employees are not unlawful at common law unless or until is is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public." (Slip Opn., p. 38.)

Contrary to Plaintiff's assertion, there was no substantial and imminent threat to the health or safety of the public with respect to the instant strike. The reason for this, as stated on several occasions by Plaintiff (see, e.g., Plaintiff's Brief to Court of Appeal, p. 5; RT: 1252:18 and 1258:5), is that the strike was not effective since management, supervisors, and other non-striking employees operated the District's facilities without any interruption. Thus, as this Court noted, "replacement personnel adequately maintained needed sanitation services without any significant threat of harm to the public." (Slip Opn., p. 40, n. 35.) Since the District was able to secure replacement personnel from the moment the strike

started, without any difficulty, there was no irreparable harm to public health or safety in the instant case.

Much of Plaintiff's argument regarding the legality of the instant strike under the Court's new standard is based on conjecture as to what might have happened had the District not been able to secure replacement personnel to operate the District's facilities. The fact is, the District's operation was never curtailed, and that is why the District was not able to show "that the health and safety of the public was at any time imminently threatened." (Slip Opn., pp. 39-40.) Accordingly, the Court correctly concluded that "the legality of the strike would have been upheld under [the Court's] newly adopted standard." (Slip Opn., p. 40.)

## II

**Plaintiff Improperly Argues That the Court's New Standard for Determining the Legality of Public Sector Strikes Interferes with Plaintiff's Obligations Under Federal Law, in That the Federal Laws Asserted Were Not Presented By Plaintiff When the Case Was Originally Submitted.**

Plaintiff argues, for the first time, that the Court's determination that the instant strike was legal impermissibly interferes with the Federal Water Pollution Control Act (33 U.S.C. Sections 1251, et seq.) and the Federal Resource Conservation and Recovery Act of 1976 (42 U.S.C. Sections 6901, et seq.). Nowhere in Plaintiff's Answer to the Petition for Hearing in this case did

Plaintiff raise any federal environmental or pollution control statute in support of its position.[1]

On numerous occasions, this Court has declared that it will not grant a rehearing on points newly urged in a petition for rehearing. It is the duty of counsel to see that all points are properly presented in the original briefs or argument, before submission. As early as 1857, this Court, in *Andrews vs. Mokelumne Hill Company,* 7 Cal. 330, 333, characterized the practice of attorneys of raising new points in a petition for rehearing as a "most pernicious practice". Since *Andrews*, this Court and the Courts of Appeal have refused to grant rehearings on points newly urged in a petition for rehearing. See *Estabrook Co. vs. Ind. Acc. Com.* (1918), 177 Cal. 767, 771; *Prince vs. Hill* (1915), 170 Cal. 193, 195; *Smith vs. Crocker First National Bank* (1957), 152 Cal.App.2d 832, 836; *Epperson vs. Rosemond* (1950), 100 Cal.App.2d 344, 347; *Pacific Finance Corp. vs. Lynwood* (1931), 114 Cal.App. 509, 516.

Additionally, the federal statutes raised for the first time by Plaintiffs are environmental and pollution control statutes. These laws have nothing whatsoever to do with labor-management relations. There are a multitude of federal laws touching upon all aspects of our daily lives. This does not mean that local public employee labor-management relations are subject to these various federal laws.

It is clear that Plaintiff has raised the Federal Water Pollution Control Act and the Federal Resource Conservation and Recovery Act of 1976 as a veiled attempt to inject a "federal issue" into the instant case so that an

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[1]Plaintiff did refer to the Clayton Antitrust Act (15 U.S.C. Sections 15, 17 and 26) and various sections of the National Labor Relations Act (29 U.S.C. Sections 150, et seq.).

appeal to the U.S. Supreme Court will be possible. This conduct also constitutes a "pernicious practice." The Petition for Rehearing should therefore be denied.

## III

### A Remand to the Superior Court Is Not Necessary.

As aforementioned, the Court concluded that in the instant case, "there was no showing by the District that the health and safety of the public was at any time imminently threatened." (Slip Opn., pp. 39-40.) The Court was able to reach this conclusion because the transcripts and exhibits in the instant case presented a full and complete record of the events preceding, during, and after the strike. The trial was a lengthy one, with hundreds of exhibits and over 1,000 pages of testimony. Furthermore, the trial court made detailed findings. A remand in the instant case is simply not necessary, and therefore a rehearing should not be granted.

## CONCLUSION

For all the foregoing reasons, Plaintiff's Petition for Rehearing should be denied.

Respectfully submitted,

GEFFNER & SATZMAN
A Professional Corporation

By_____
JEFFREY PAULE
*Attorneys for Defendant*
*Los Angeles County Employees*
*Association, Local 660*

DATED: June 3, 1985

# VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing_____
_____and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am ☐ an Officer ☐ a partner_____ ☐ a_____ of_____
a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. ☐ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. ☐ The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am one of the attorneys for_____,
a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on_____, 19___,
at_____California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Type or Print Name _____ Signature _____

ACKNOWLEDGMENT OF RECEIPT OF DOCUMENT
(other than summons and complaint)

Received copy of document described as_____ on_____19___.

Type or Print Name _____ Signature _____

PROOF OF SERVICE
STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 3055 Wilshire Blvd., Suite 900, Los Angeles, CA 90010.

On June 4, 1985, I served the foregoing document described as Answer To Petition For Rehearing on the parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

See Attached

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

Executed on_____, 19___, at_____, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on_____, 19___, at_____, California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

| ALICE BROGLIA | /s/ Alice Broglia |
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| Type or Print Name | Signature |

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